IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

NO. 77-5547

JERRY JACKSON,

Petitioner,

V.

THE STATE OF OHIO,

Respondent.

Petition for Writ of Certiorari

BRIEF FOR PETITIONER

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OPINIONS BELOW

The opinion of the Supreme Court of Ohio [A.2-8], reported at 50 O.S.2d 253, and the opinion of the Court of Appeals for the First Appellate District of Ohio [A.9-23], not yet reported, are reproduced in the Appendix.

JURISDICTION

Jurisdiction of this Court is invoked under 28 USC §1257 (3), the Petitioner having asserted below and in this Court a denial of rights secured to him by the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A. THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION:

"No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

B. THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION:

In pertinent part, the Sixth Amendment provides:

". . . ., and to have the assistance of counsel for his defense."

C. THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION:

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."

D. THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION:

In pertinent part, the Fourteenth Amendment provides:

". . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

E. THE OHIO AGGRAVATED MURDER STATUTES:

§2903.01 Aggravated murder

(A) No person shall purposely, and with prior calculation and design, cause the death of another.

(B) No person shall purposely cause the death of another while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson or arson, aggravated robbery or robbery, aggravated burglary or burglary, or escape.

(C) Whoever violates this section is guilty of aggravated murder, and shall be punished as provided in section 2929.03 of the Revised Code.

§2929.02 Penalties for murder

(A) Whoever is convicted of aggravated murder in violation of section 2903.01 of the Revised Code shall suffer death or be imprisoned for life, as determined pursuant to sections 2929.03 and 2929.04 of the Revised Code. In addition, the offender may be fined an amount fixed by the court, but not more than twenty-five thousand dollars.

(B) Whoever is convicted of or pleads guilty to murder in violation of section 2903.03 of the Revised Code shall be imprisoned for an indefinite term of fifteen years to life. In addition, the offender may be fined an amount fixed by the court, but not more than fifteen thousand dollars.

(C) The court shall not impose a fina in addition to imprisonment or death for aggravated murder, or in addition to imprisonment for murder, unless the offense was committed with purpose to establish, maintain, or facilitate an activity of, a criminal syndicate as defined in section 2923.04 of the Revised Code, or was committed for hire or for purpose of gain.

(D) The court shall not impose a fine or fines for aggravated murder or murder which, in the aggregate and to the extent not suspended by the court, exceeds the amount which the offender is or will be able to pay by the method and within the time allowed without undue hardship to himself or his dependents, or will prevent him from making reparation for the victim's wrongful death.

§2929.03 Imposing sentence for a capital offense

(A) If the indictment or count in the indictment charging aggravated murder contains no specification of an aggravating circumstance listed in division (A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge, the trial court shall impose sentence of life imprisonment on the offender.

(B) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, the verdict shall separately state whether the accused is found guilty or not guilty of the principal charge and,

if guilty of the principal charge, whether the offender is guilty or not guilty of each specification. The jury shall be instructed that a specification must be proved beyond a reasonable doubt in order to support a guilty verdict on such specification, but such instruction shall not mention the penalty which may be the consequence of a guilty or not guilty verdict on any charge or specification.

(C) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge but not guilty of each of the specifications, the trial court shall impose sentence of life imprisonment on the offender. If the indictment contains one or more specifications listed in division (A) of such section, then, following a verdict of guilty of both the charge and one or more of the specifications, the penalty to be imposed on the offender shall be determined:

(1) By the panel of three judges which tried the offender upon his waiver of the right to trial by jury;

(2) By the trial judge, if the offender was tried by a jury;

(3) When death may be imposed as a penalty for aggravated murder, the court shall require a pre-sentence investigation and a psychiatric examination to be made, and reports submitted to the court, pursuant to section 2947.06 of the Revised Code. Copies of the reports shall be furnished to the prosecutor and to the offender or his counsel. The court shall hear testimony and other evidence, the statement, if any, of the offender, and the arguments, if any, of counsel for the defense and prosecution, relevant to the penalty which should be imposed on the offender. If the offender chooses to make a statement, he is subject to cross-examination only if he consents to make such statement under oath or affirmation.

(E) Upon consideration of the reports, testimony, other evidence, statement of the offender, and arguments of counsel submitted to the court pursuant to division (D) of this section, if the court finds, or if the panel of three judges unanimously finds that none of the mitigating circumstances listed in division (B) of section 2929.04 of the Revised Code is established by a preponderance of the evidence, it shall impose sentence of death on the offender. Otherwise, it shall impose sentence of life imprisonment on the offender.

§2929.04 Criteria for imposing death or imprisonment for a capital offense

(A) Imposition of the death penalty for aggravated murder is precluded, unless one or more of the following is specified in the indictment or count in the indictment pursuant to section 2941.14 of the Revised Code, and is proved beyond a reasonable doubt:

(1) The offense was the assassination of the president of the United States or person in line of succession to the presidency, or of the governor or lieutenant governor of this state, or of the president-elect or vice president-elect of the United States, or of the governor-elect or lieutenant governor-elect of this state, or

of a candidate for any of the foregoing offices. For purposes of this division, a person is a candidate if he has been nominated for election according to law, or if he has filed a petition or petitions according to law to have his name placed on the ballot in a primary or general election, or if he campaigns as a write-in candidate in a primary or general election.

(2) The offense was committed for hire.

(3) The offense was committed for the purpose of escaping detection, apprehension, trial, or punishment for another offense committed by the offender.

(4) The offense was committed while the offender was a prisoner in a detention facility as defined in section 2921.01 of the Revised Code.

(5) The offender has previously been convicted of an offense of which the gist was the purposeful killing of or attempt to kill another, committed prior to the offense at bar, or the offense at bar was a part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons by the offender.

(6) The victim of the offense was a law enforcement officer whom the offender knew to be such, and either the victim was engaged in his duties at the time of the offense, or it was the offender's specific purpose to kill a law enforcement officer.

(7) The offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson, aggravated robbery, or aggravated burglary.

(B) Regardless of whether one or more of the aggravating circumstances listed in division (A) of this section is specified in the indictment and proved beyond a reasonable doubt, the death penalty for aggravated murder is precluded when, considering the nature and circumstances of the offense and the history, character, and condition of the offender, one or more of the following is established by a preponderance of the evidence:

(1) The victim of the offense induced or facilitated it.

(2) It is unlikely that the offense would have been committed, but the fact that the offender was under duress, coercion, or stong provocation.

(3) The offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity.

F. THE OHIO RULES OF CRIMINAL PROCEDURE

Rule 11 Pleas, rights upon plea

(A) Pleas. A defendant may plead not guilty, not guilty by reason of insanity, guilty or, with the consent of the court, no contest. A plea of not guilty by reason of insanity shall be made in writing by either the defendant or his attorney. All other pleas may be made orally. The pleas of not guilty and not guilty by reason of insanity may be joined. If a defendant refuses to plead, the court shall enter a plea of not guilty on behalf of the defendant.

(B) Effect of guilty or no contest pleas. With reference to the offense or offenses to which the plea is entered:

(1) The plea of guilty is a complete admission of the defendant's guilt.

(2) The plea of no contest is not an admission of defendant's guilt, but is an admission of the truth of the facts alleged in the indictment, information, or complaint and such plea or admission shall not be used against the defendant in any subsequent civil or criminal proceeding.

(3) When a plea of guilty or no contest is accepted pursuant to this rule, the court shall, except as provided in subsections (C)(3) and (4), proceed with sentencing under Rule 32.

(C) Pleas of guilty and no contest in felony cases.

(1) Where in a felony case the defendant is unrepresented by counsel the court shall not accept a plea of guilty or no contest unless the defendant, after being readvised that he has the right to be represented by retained counsel, or pursuant to Rule 44 by appointed counsel, waives this right.

(2) In felony cases the court may refuse to accept a plea of guilty or a plea of no contest, and shall not accept such plea without first addressing the defendant personally and:

(a) Determining that he is making the plea voluntarily, with understanding of the nature of the charge and of the maximum penalty involved, and, if applicable, that he is not eligible for probation.

(b) Informing him of and determining that he understands the effect of his plea of guilty or no contest, and that the court upon acceptance of the plea may proceed with judgment and sentence.

(c) Informing him and determining that he understands that by his plea he is waiving his rights to jury trial, to confront witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to require the state to prove his guilt beyond a reasonable doubt at a trial at which he cannot be compelled to testify against himself.

(3) With respect to aggravated murder committed on and after January 1, 1974, the defendant shall plead separately to the charge and to each specification, if any. A plea of guilty or no contest to the charge waives the defendant's right to a jury trial, and before accepting such plea the court shall so advise the defendant and determine that he understands the consequences of such plea.

If the indictment contains no specification, and a plea of guilty or no contest to the charge is accepted, the court shall impose the sentence provided by law.

If the indictment contains one or more specifications, and a plea of guilty or no contest to the charge is accepted, the court may dismiss the specifications and impose sentence accordingly, in the interests of justice.

If the indictment contains one or more specifications which are not dismissed upon acceptance of a plea of guilty or no contest to the charge, or if pleas of guilty or no contest to both the charge and one or more specifications are accepted, a court

composed of three judges shall: (a) determine whether the offense was aggravated murder or a lesser offense; and (b) if the offense is determined to have been a lesser offense, impose sentence accordingly; or (c) if the offense is determined to have been aggravated murder, proceed as provided by law to determine the presence or absence of the specified aggravating circumstances and of mitigating circumstances, and impose sentence accordingly.

(4) With respect to all other cases the court need not take testimony upon a plea of guilty or no contest.

(D) Misdemeanor cases involving serious offenses. In misdemeanor cases involving serious offenses the court may refuse to accept a plea of guilty or no contest, and shall not accept such plea without first addressing the defendant personally and informing him of the effect of the pleas of guilty, no contest, and not guilty and determining that he is making the plea voluntarily. Where the defendant is unrepresented by counsel the court shall not accept a plea of guilty or no contest unless the defendant, after being readvised that he has the right to be represented by retained counsel, or pursuant to Rule 44 by appointed counsel, waives this right.

(E) Misdemeanor cases involving petty offenses. In misdemeanor cases involving petty offenses the court may refuse to accept a plea of guilty or no contest, and shall not accept such plea without first informing the defendant of the effect of the pleas of guilty, no contest, and not guilty.

The counsel provisions of Rule 44(B) and (C) apply to this subdivision.

(F) Negotiated plea in felony cases. When, in felony cases, a negotiated plea of guilty or no contest to one or more offenses charged to one or more other or lesser offenses is offered, the underlying agreement upon which the plea is based shall be stated on the record in open court.

(G) Refusal of court to accept plea. If the court refuses to accept a plea of guilty or no contest, the court shall enter a plea of not guilty on behalf of the defendant. In such cases neither plea shall be admissible in evidence nor be the subject of comment by the prosecuting attorney or court.

(H) Defense of insanity. The defense of not guilty by reason of insanity must be pleaded at the time of arraignment, except that the court for good cause shown shall permit such a plea to be entered at any time before trial. A defendant who does not plead not guilty by reason of insanity is conclusively presumed to have been sane at the time of the commission of the offense charged.

F. THE OHIO COMPLICITY (AIDER AND ABETTOR) STATUTE:

Ohio Revised Code
E. Complicity. §2923.03, R.C.

1. Text of §2923.03, R.C., eff. 1-1-74.

§2923.03 (A) No person, acting with the kind of culpability required for the commission of an offense, shall do any of the following:

(1) Solicit or procure another to commit the offense;

(2) Aid or abet another in committing the offense;

(3) Conspire with another to commit the offense in violation of §2923.01, R.C.;

(4) Cause an innocent or irresponsible person to commit the offense.

(B) It is no defense to a charge under this section that no person with whom the accused was in complicity has been convicted as a principal offender.

(C) No person shall be convicted of complicity under this section unless an offense is actually committed, but a person may be convicted of complicity in an attempt to commit an offense in violation of §2923.02, R.C.

(D) No person shall be convicted of complicity under this section solely upon the testimony of an accomplice, unsupported by other evidence.

(E) It is an affirmative defense to a charge under this section that, prior to the commission of or attempt to commit the offense, the actor terminated his complicity, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose.

(F) Whoever violates this section is guilty of complicity in the commission of an offense, and shall be prosecuted and punished as if he were a principal offender. A charge of complicity may be stated in terms of this section, or in terms of the principal offense.

QUESTIONS PRESENTED

I.

Whether the admission into evidence at trial of a confession obtained from Petitioner by Cincinnati Police Officers while Petitioner is being held in jail in Kentucky formally charged with a crime in that state, having had counsel appointed for him therein, violates the Fifth and Sixth Amendments of the United States Constitution as applied to the states through the Fourteenth Amendment of the United States Constitution when that confession was obtained only after the interrogating officers advised Petitioner that his two co-defendants had already confessed, implicating him as the "trigger man", and then played portions of the co-defendants' recorded statements to him to prove that the co-defendants had indeed made the statements claimed, and when, in addition thereto, the officers told Petitioner they had two witnesses to the offense which in fact was untrue.

II.

Whether Rule 11(C)(3) of the Ohio Rules of Criminal Procedure which empowers a trial court to dismiss a specification contained in an indictment upon acceptance of a plea of guilty or no contest and impose sentence accordingly, in the interests of justice, in one case denies another accused, Petitioner, equal protection of the law and the protection against cruel, unusual and arbitrary punishment when that other accused is a co-defendant to the same offense and is granted the opportunity to enter a plea of guilty to the offense of aggravated murder, the specification being dismissed, resulting in him receiving a sentence of life imprisonment, and where the Petitioner, being a co-defendant in the same matter, is denied the same opportunity and is compelled to rely on the statutes of Ohio regulating imposition of the sentence for a capital offense as contained in Section 2929.03, Ohio Revised Code, and the criteria for such imposition and mitigating circumstances and burden of showing such circumstances as contained in Section 2929.04, Ohio Revised Code, all of which places on Petitioner a burden not placed on his co-defendant, and which further raises the question of a fatal inconsistency between the rule and the statutes, thereby enabling one accused to be granted a benefit arbitrarily denied another.

STATEMENT OF THE CASE

This cause arose as the result of the return of Indictment No. B743479 by the Grand Jury of Hamilton County, Ohio, in which indictment the Petitioner and one Curtis Palmore were jointly accused of the crimes of Aggravated Murder while perpetrating the crime of Aggravated Robbery. [A.38]

The essential facts which led to the above indictment occurred on November 14, 1974 when Charles Pomerantz, a seventeen year old part-time employee of the Queensgate Shell Service Station, was shot during a robbery of the service station. The injury Pomerantz received, a gunshot wound from a .22 caliber weapon in the back of his head, was the direct cause of his death at General Hospital, three days later, November 17, 1974.

Except for Pomerantz, who never regained consciousness, there were no witnesses to the crimes and no physical evidence that enabled authorities to determine who had perpetrated the crime.

The only evidence that the authorities were able to gather in addition to the shooting of Pomerantz was the evidence of the Aggravated Robbery which revealed that Pomerantz' wallet was missing as well as the coin changer he had been carrying and a cash box from the service station (R.216).

On November 18, 1974, Richard Earl Palmore, father of the co-defendant, Curtis Palmore, examined the contents of a shoe box his son kept in his closet at their residence and found several identification cards bearing the name of the deceased, Charles Pomerantz (R.186). Having read of the death

of Pomerantz, he called Cincinnati Police Officers who came to his residence and seized these items.

Earlier on that same date, November 18, 1974, the Petitioner, the co-defendant in the within case, Curtis Palmore, and a third man, William Mascus, had been arrested in Covington, Kentucky in connection with a robbery of a delicatessen, and were being held in the Campbell County, Kentucky Jail. They had all appeared in court on the morning of November 19, 1974 for arraignment and had Kentucky counsel appointed for them later.

On the morning of November 19, 1974, detectives from the Homicide Squad of the Cincinnati Police Division went to the Campbell County, Kentucky Jail and interrogated first William Mascus, then Curtis Palmore and finally the Petitioner, telling him that Palmore had accused him of shooting Charles Pomerantz (R.7). As a result of this interrogation, the Petitioner gave a statement to Detectives Sefton and Thompson admitting that he was with Palmore when the deceased was shot but denying that he had shot the deceased.

After conducting separate interviews, the detectives obtained a joint statement from the three men (R.259).

After the within indictment was returned the case against the co-defendant, Curtis Palmore, was assigned to the Honorable Gilbert M. Bettman, Judge of the Court of Common Pleas for Hamilton County, Ohio, for trial.

On April 21, 1975, the date set for the commencement of Palmore's trial before Judge Bettman, Palmore's attorneys moved

the court to dismiss the specification of aggravated circumstances against Palmore in exchange for which Palmore would enter pleas of guilty to the crimes of Aggravated Murder and Aggravated Robbery, being Counts One and Two of the indictment. This maneuver was carried out in order to permit Judge Bettman to accept Palmore's plea and to sentence him to life imprisonment without conducting a pre-sentence probation investigation, psychiatric evaluations and separate hearing in accordance with Section 2929.04, Ohio Revised Code, to determine if mitigating circumstances existed which would enable the trial court to avoid the statutory criteria for determining whether death or life imprisonment was to be imposed. (R.1-43)

This motion made by Palmore's attorneys was pursuant to provisions set forth in Rule 11 (C)(4) [11(C)(3)], Criminal Rules, which permits a trial court to dismiss a specification in the interest of justice and impose life imprisonment after (emphasis added) the defendant has entered a plea of guilty or no contest to the charge, and the court accepts said plea.

Judge Bettman cited four reasons in his opinion and decision to accept Palmore's plea and to dismiss the specification of aggravated circumstances, thereby authorizing him to sentence Palmore to life imprisonment and circumvent the requirements of Section 2929.04, Ohio Revised Code. These four reasons are contained in (Curtis Palmore, R.18-20).

The one reason recited herein given by Judge Bettman for dismissing the specification of aggravated circumstances against Curtis Palmore which the judge declared enabled him to

accept Palmore's plea and sentence him immediately to life imprisonment rather than conducting an investigation and separate hearing pursuant to Sections 2929.03 and 2929.04, Ohio Revised Code, was a deposition taken of William Mascus on April 17, 1975 at LaGrange, Kentucky, in which Mascus had testified that both Jackson and Palmore had told him that it was Jackson who had shot and killed Charles Pomerantz (Curtis Palmore, R.5-7).

Judge Bettman also stated that he had taken the liberty to discuss this matter with Detective Frank Sefton of the Cincinnati Police Division who had interrogated Mascus, Palmore and Jackson at the Campbell County, Kentucky Jail on November 19, 1974, and was told by Sefton that he believed that it was Jackson who had shot Pomerantz (Curtis Palmore, R.17-20). Based on these disclosures, Judge Bettman announced that he believed Curtis Palmore was not the gunman, and he would therefore dismiss the specification of aggravated circumstances if Palmore entered a plea of guilty to the indictment.

Thereafter Judge Bettman received Palmore's plea to the indictment in its entirety (Curtis Palmore, R.35), and sentenced Palmore to life imprisonment on Count One, the Aggravated Murder, and for a period of not less than seven nor more than twenty-five years on Count Two, the Aggravated Robbery, the two sentences to run concurrently. The court then ordered the specification dismissed (Curtis Palmore, R.43).

On March 19, 1975, a panel of three Common Pleas Court Judges for Hamilton County, Ohio, Judge William Morrissey

presiding and Judges Lyle W. Castle and Thomas C. Nurre participating, heard and overruled a motion to suppress the statements that police officers had taken from the Petitioner (R.75).

The trial court also denied Petitioner's motion to dismiss the specification of aggravated circumstances and to proceed in his case as Judge Bettman had proceeded in the co-defendant's case (R.92).

On the same date the court heard argument presented on behalf of Petitioner to discharge him for failure of the prosecution to bring him to trial within the time prescribed in such case by Section 2945.71, Ohio Revised Code, and took the matter under submission and thereafter on May 19, 1975, denied this motion (R.95).

On May 16, 1975, counsel for the State and for the within Petitioner traveled to the Kentucky State Reformatory at LaGrange, Kentucky to take a recorded deposition of William Mascus. This was the second deposition taken of this person on motion by the State of Ohio, the first having been taken on April 17, 1975 at the request of the State of Ohio in the Palmore case without the knowledge of counsel for the Petitioner herein, no notice or invitation having been given to said counsel that the earlier deposition was scheduled or that they could be in attendance.

At the second deposition (R.293-299), William Mascus retracted his testimony given in the earlier deposition and testified on May 16, 1976, in Petitioner's case, that Curtis

Palmore had shot Charles Pomerantz, not Jerry Jackson (emphasis added). He testified (R.291-293) that he knew this because he was with Palmore and Jackson on the night of the robbery and homicide (R.191-302).

This second deposition not only completely contradicted one of the four reasons cited by Judge Bettman a month earlier for sparing Curtis Palmore from death in the electric chair, but it led to an indictment being returned against William Mascus for the same offenses: Aggravated Murder of Charles Pomerantz and Aggravated Robbery for which he was found guilty in Hamilton County Common Pleas Court on March 19, 1976, in Criminal Case No. B753151.

On May 19, 1975, Petitioner's trial commenced before the aforementioned three judge panel. Prior to the court hearing any evidence, the Petitioner again offered, this time in writing (R.102), to tender a plea of guilty to both counts of the indictment on the condition that the court dismiss the specification of aggravated circumstances and proceed to sentence Petitioner to life imprisonment as had been done in Palmore's case (R.102). This written offer to plead as above recited was amended by separate motion and on May 20, 1975 the trial court denied both motions (R.106).

The cause then proceeded to trial with the State of Ohio offering evidence in support of its accusations against the Petitioner. At the conclusion of the State's case in chief, among other exhibits offered and accepted, the trial court received into evidence on behalf of the Petitioner a transcript

of the proceeding had before Judge Bettman in the case of Curtis Palmore.

Thereafter, the State having rested it's case, the court heard and denied a motion for judgment of acquittal made on behalf of Petitioner (R.338). The court also heard again and denied again Petitioner's motion to be permitted to enter a plea of guilty to the indictments in exchange for dismissal of the specification of aggravated circumstances and a sentence of life imprisonment as to Count One as had been done in the case of Curtis Palmore (R.344).

At the conclusion of the defendant's case in chief, no rebuttal testimony being offered by the State, the Petitioner once again offered to plead guilty to the indictment, provided the trial court would dismiss the specification of aggravated circumstances, sentence him to life imprisonment. This motion was again denied by the trial court (R.391).

After argument the three judge trial panel found the Petitioner guilty of Aggravated Murder and Aggravated Robbery, being the specification of aggravated circumstances. The court thereupon ordered a pre-sentence examination and psychiatric evaluation as prescribed by Section 2929.03, Ohio Revised Code [A.37].

On September 11, 1975, the trial court sentenced the Petitioner to death for the offense of Aggravated Murder and to serve a term of seven to twenty-five years for the offense of Aggravated Robbery [A.36].

On December 13, 1976, the Court of Appeals for the First Appellate District of Ohio affirmed the conviction of the

Petitioner, Jerry Jackson, and issued a mandate to the Court of Common Pleas of Hamilton County, Ohio for execution of its judgment [A.35], and on that same date, in a joint decision, reversed the trial court's decision in the case of Curtis Palmore, remanding his case to the Court of Common Pleas of Hamilton County, Ohio for imposition of the sentence of life imprisonment which had been previously imposed upon him by Judge Gilbert M. Bettman as the result of his earlier plea entered before that judge, from which the State of Ohio had taken its appeal to the Court of Appeals for the First Appellate District of Ohio [A.9-23].

On January 11, 1977, Notice of Appeal was filed upon behalf of Petitioner, Jerry Jackson, in the Court of Appeals for the First Appellate District of Ohio, appealing that court's decision to the Supreme Court of Ohio.

On June 22, 1977, the Ohio Supreme Court affirmed the judgment of the Court of Appeals for the First Appellate District of Ohio and ordered that the Petitioner's sentence of death be executed on Monday, August 22, 1977.

Thereafter, the Petitioner filed an application with the Supreme Court of Ohio for a rehearing and a stay of execution which was denied by the Supreme Court of Ohio on July 8, 1977. [A.35-42]

On July 12, 1977 the Supreme Court of Ohio ordered an indefinite stay of execution on behalf of the Petitioner pending the filing of a timely Notice of Appeal or a Petition for a Writ of Certiorari by said Petitioner with the Supreme Court of the United States, and further ordered that said stay of

execution would automatically continue pending final termination of the case by the Supreme Court of the United States [A.24].

On September 27, 1977 a three judge trial panel sitting in the Common Pleas Court of Hamilton County, Ohio, ruled that the co-defendant, Curtis Palmore, would not be retried for the offenses of Aggravated Murder and Aggravated Robbery, and held on page 5 of its memorandum decision [A.29] that

> "The trial judge's judgment entry are [is][sic] not unconstitutionally discriminatory and defendant's motion to dismiss is well taken and granted as it relates to the fifth issue which pertains to a failure to show the trial judge abused his discretion."

The result of the above decision results in the fact that Curtis Palmore, a co-defendant, has escaped capital punishment because he was permitted to enter a plea under Ohio Criminal Rule 11(C)(3) while Petitioner has been denied the same opportunity and thereby, the same protection of the law.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

A motion to suppress the confession obtained from Petitioner was filed in the trial court, and was denied. The same challenge was made in the Court of Appeals and denied [A.20-21]. The Ohio Supreme Court rejected the same contention [A.3-5].

With regard to the denial of the request of Petitioner to be permitted to plead to the offense and to have the specification dismissed as had been afforded to his co-defendant, this was denied by the trial court. The unconstitutionality

of the procedure permitted by the Ohio Rules of Criminal Procedure, Rule 11(C)(3), interrelated with Sections 2929.03 and .04, Ohio Revised Code, was raised in the Court of Appeals and denied [A.20]. The Supreme Court of Ohio rejected this contention when raised in that court [A.5]. That court also denied Petitioner's motion for rehearing on that question on July 8, 1977 [A.1].

ARGUMENT

I.

THE ADMISSION INTO EVIDENCE AT TRIAL OF A CONFESSION OBTAINED FROM PETITIONER BY CINCINNATI POLICE OFFICERS WHILE PETITIONER IS BEING HELD IN JAIL IN KENTUCKY FORMALLY CHARGED WITH A CRIME IN THAT STATE, HAVING HAD COUNSEL APPOINTED FOR HIM THEREIN, VIOLATES THE FIFTH AND SIXTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AS APPLIED TO THE STATES THROUGH THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION WHEN THAT CONFESSION WAS OBTAINED ONLY AFTER THE INTERROGATING OFFICERS ADVISED PETITIONER THAT HIS TWO CO-DEFENDANTS HAD ALREADY CONFESSED, IMPLICATING HIM AS THE "TRIGGER MAN", AND THEN PLAYED PORTIONS OF THE CO-DEFENDANTS' RECORDED STATEMENTS TO HIM TO PROVE THAT THE CO-DEFENDANTS HAD INDEED MADE THE STATEMENTS CLAIMED, AND WHEN, IN ADDITION THERETO, THE OFFICERS TOLD PETITIONER THEY HAD TWO WITNESSES TO THE OFFENSE WHICH IN FACT WAS UNTRUE.

The record in the case at bar revealed that Cincinnati Homicide Detectives Frank Sefton and Ernest Thompson went to the Campbell County, Kentucky Jail on November 19, 1974 to talk to William Mascus, Curtis Palmore and the Petitioner (R.27) in connection with the Pomerantz homicide (R.28).

When the detectives arrived at the jail they were aware that the trio had been arrested in Covington on November 18, 1974 in connection with a robbery in that city (R.28).

According to the testimony of Detective Sefton, they first orally interviewed William Mascus for approximately thirty minutes and then taped a statement given by him in connection with the Pomerantz homicide (R.31). During this statement they indicated to Mascus that they believed he was involved in Pomerantz' death (R.31). As a result, they did obtain a statement from Mascus who was not represented by counsel (R.32).

After completing the interview with Mascus they interrogated Curtis Palmore orally for thirty minutes and then obtained a twenty-five minute taped statement from him (R.32). Palmore was not represented by counsel either at this interrogation (R.34). The detectives advised Palmore that there were two witnesses who could identify him, and that they were in possession of the personal effects belonging to Pomerantz that Palmore's father had found (R.34). Palmore was told of the existence of two witnesses and the possession of Pomerantz' belongings by the police before (emphasis added) he made his statement against interest (R.36,37). Thereafter Palmore gave a statement admitting his participation in the robbery and shooting of Pomerantz during which he was asked if the Petitioner was involved, to which he answered yes (R.37). Palmore also accused Jackson of being the trigger man (R.38) and that Jackson had taken the cash box (R.38).

According to Detective Sefton's testimony they interrogated Petitioner after completing the interrogation of Curtis Palmore (R.40). Detective Sefton admitted that he orally interrogated Petitioner for twenty (20) minutes (emphasis added) before he executed a waiver of his rights (R.41).

During this period of time Detective Sefton told Petitioner that the police had two witnesses who could identify a suspect who they believed was him (R.43). The detectives also played portions of the statement earlier given by Palmore in which he accused Jackson of being involved in the robbery, and in which he accused Palmore of being the "trigger man" (R.43).

They also advised Petitioner that William Mascus had also been interviewed and during that interview had implicated him as well (R.44,45). Sefton also admitted telling Petitioner Jackson during this oral conversation that Palmore had said it was Jackson who took the cash box from the service station (R.45), and the identification cards from the body of Pomerantz, the victim (R.45 and 56). When Jackson expressed disbelief at this, Sefton played that portion of the Palmore statement so that Jackson could hear it for himself (R.46).

Sefton admitted on the witness stand that he and Thompson advised Jackson that Palmore had accused him of the aforementioned actions before they obtained a statement from him, and that when he said he didn't believe Palmore had said these things they played Palmore's recorded confession to Jackson to prove it (R.47).

Sefton admitted that when he obtained statements from Mascus, Palmore and Petitioner, he was aware that they had already been charged in Kentucky with Armed Robbery, but denied knowing that they had already had court-appointed counsel assigned to them (R.47).

He also testified that neither he nor Detective Thompson attempted in any way to inquire if in fact counsel had been appointed to represent them.

Finally and critically important to this issue, Detective Sefton admitted under oath that the oral interview with Jackson which was conducted before he was asked to record his statement, was an accusatory interview in which the detectives told

Jackson what Mascus and Palmore had already related to them concerning Jackson's involvement and activity in the offense, and then their asking Jackson to either confirm or deny what the others had said (R.48). The recorded statement was then conducted permitting Jackson to repeat again what the detectives had elicited from him by the devious method of telling him what his accomplices had accused him of earlier (R.48).

On redirect, Detective Sefton advised the court that in addition to the oral interview he and Detective Thompson conducted of Petitioner, Petitioner had also been orally interviewed by Detectives Rutledge and Williamson, the effect being that by the time Petitioner gave a recorded statement he had been interviewed four (4) times (emphasis added) at the Campbell County Jail in one day without the presence of his court-appointed counsel (R.57,58).

On the motion to suppress the confessions, the Petitioner testified that before he made any statement to the detectives, oral or recorded, they advised him that they had talked to Mascus and Palmore (R.6), had been shown the deceased's identification (R.7) and that Palmore had accused him of being the "trigger man" (R.7). He corroborated Sefton's testimony that when he expressed disbelief that Palmore had so accused him, they played Palmore's recording to convince him it was true (R.7). He also testified that the detectives advised him that they had two witnesses who saw them come out of the service station (R.8).

The question to be dealt with in this issue is not whether the interrogating officers advised the Petitioner of his Fifth

Amendment privilege against self-incrimination or his Sixth Amendment right to presence and assistance of counsel, but whether they ignored these rights after advising him of them.

The State argued herein, as it has in other cases of a similar nature, that even if the confession was obtained in violation of the constitutional privilege, the subsequent testimony of the Petitioner at trial cured his error.

In the unreported case of *State of Ohio v. Ronald Amos*, No. C73236, decided by the Court of Appeals for the First Appellate District of Ohio, the State admitted on page five of its supplemental brief that no reported case could be found that upheld its theory that the testimony of a defendant at trial negates the erroneous admission into evidence of an unlawfully obtained confession. No such case exists because to so hold would violate the spirit of the constitutional guarantee itself.

In *Simmons v. United States*, 390 U.S. 377 (1968), the Supreme Court held that no one accused of a crime can be required to abandon one constitutional privilege in order to exercise another. Therefore, it would be incompatable to hold that an accused foregoes his right to continue to object to the admission of a claimed illegally obtained confession by exercising his privilege to testify at trial on his own behalf. *Lee v. Mississippi*, 332 U.S. 742 (1948).

The state has also argued that the courts have recently taken a view that all trial errors which violate constitutional rights do not automatically require reversal as announced in

Chapman v. California, 386 U.S. 18 (1967), and in *Milton v. Wainwright*, 407 U.S. 371 (1972). This is true. However, both of these cases dealt with situations where all of the other evidence independent of the illegally obtained confessions was so overwhelming that the reviewing courts could not reasonably find that the confessions alone were the critical proof of guilt.

In the case at bar, the confession obtained by the detectives from the Petitioner is a critical part of the State's evidence because there were no witnesses to the homicide or robbery who placed Petitioner at or even near the scene of the crime; no physical or scientific evidence that placed the Petitioner at the scene of the crime; and no other evidence to connect him as an aider and abettor to the two offenses except the statements of his co-defendants, which could not have been used against him at trial since they were uncorroborated statements of co-defendants.

One issue that can be dealt with in brief is the question of the burden of proof concerning the admissibility of a confession. The Supreme Court of the United States settled this question in *Lego v. Twomey*, 404 U.S. 477 (1972), when it held that when the accused challenges the admission of a confession on the ground that was not voluntarily given, the State has the burden to prove that it was in fact voluntary and that proof must be <u>at least</u> (emphasis added) by a preponderance of the evidence.

In the case at bar, the entire argument with regard to the Petitioner's confession deals with <u>voluntariness</u> (emphasis added).

The prosecution based most of its questions concerning the subject of voluntariness on the fact that the Petitioner did sign the waiver of rights form, States Exhibit 27 (R.17-18), and the fact that the recorded interview reproduced the oral advice of rights before that interrogation began (R.19-20).

It is respectfully submitted herein that the mere signing of a form that contains the constitutional warning required by *Miranda v. Arizona*, 384 U.S. 436 (1966), or the recitation of those rights on a recording by a police officer mean nothing if the statement subsequently obtained is the result of coercion brought about by threats, promises, trickery or fraud. The Court of Appeals for Scioto County, Ohio held in *State v. Carver*, 30 APP 2d 115 (1971), that the test to be applied by the trial court in determining whether a confession is admissible is whether it is free and voluntary; that is, it must not be extracted by threat or violence, by direct or implied promises, however slight, or by exertion of any improper influence (emphasis added).

In the case at bar, Detective Sefton, the chief witness for the State in connection with the voluntariness of the confession obtained from the Petitioner, testified that he first orally discussed the case with Petitioner before the recorded interview was made, and that during this period he advised the Petitioner that Mascus and Palmore had already been interviewed and that Palmore had implicated Jackson, even accusing Jackson of being the "trigger man" (R.42-46). This witness even admitted that he played Palmore's recorded

confession to prove to Jackson that Palmore had made these accusations against him (R.46-47).

This writer is confident that the aforementioned method of interrogation is the exercise of improper influence sufficient to overcome the will to resist interrogation and to remain silent.

Detective Sefton further admitted that the method of interrogation during the initial interview was to tell Petitioner what Mascus or Palmore had earlier accused him of doing, and then to ask him to deny or corroborate these accusations (R.48).

The Supreme Court of California dealt with a similar situation in *People v. Fioretto*, 441 P.2d 624 (1968). In that case police officers actually brought accomplices into defendant-appellant's cell to accuse him to his face of his involvement with them in the crime for which defendant-appellant was then being interrogated. The California court, in reversing Fioretto's conviction and holding his subsequent confession inadmissible, stated that bringing an accomplice who has already confessed in front of the accused to confront him, which thereafter results in the accused making a statement, is such coercion and compulsion to overcome an invocation of a privilege that it renders a subsequent statement inadmissible.

There can hardly be a significant difference between the case at bar, where the detective first tells the one from whom he seeks a confession that his friend has already confessed accusing him, and secondly, plays that friend's recorded

confession to prove that what the detective has said is true, and he can hear for himself his friend's voice accusing him of not only being involved, but also accusing him of being the "trigger man" and the *Fioretto* case, *supra*, where the detectives actually brought the accomplices together, permitting a face-to-face confrontation. The point is that either tactic is the exercise of improper influence designed to overcome a desire and ability to exercise the right to remain silent.

Whenever a police officer questions a suspect in an incustodial setting and tells him all other possible accomplices have already confessed implicating him; plays one of the recordings to prove it has occurred; tells the accused that two witnesses can identify a suspect believed to be the accused and shows the accused evidence of identification removed from the deceased, he places that accused in a position where his desire to exercise his right to remain silent is overcome by improper influence and a form of psychological coercion far worse than threats of physical force.

An additional factor in the admissibility of the confession in the case at bar deals with the so-called "missing witness rule" (emphasis added). In the case at bar Detective Sefton testified that before he and Detective Thompson interrogated and Petitioner, he had been interrogated by Specialists Williamson and Rutledge (R.57-58).

It is incumbent upon the prosecution in a case in which the accused attacks the voluntariness of a confession to prove that it is voluntary. In order to do this the State

must produce as a witness any law enforcement officer who participated in any way in the interrogation that led to the confession.

No case on this point exists in Ohio. However, other states have dealt with this question and held as did the Supreme Court of Washington in *State v. Davis*, 438 P.2d 185 (1968), wherein two officers interrogated the accused and only one officer was called to testify in support of the admissibility of the confession. In ruling the admission of the confession, prejudicial error, the Washington Supreme Court ruled the state did not meet its heavy burden to show a confession admissible when it fails to offer the testimony of all officers involved in the interrogation which resulted in the confession.

In fact, in the case at bar, not only did the State fail to call as witnesses, Detective Thompson and Specialists Williamson and Rutledge, the missing witnesses who also interrogated Petitioner, the State failed to offer any witnesses at all to fulfill its burden of proving the confession was voluntarily given (R.59).

For the aforementioned reasons, it is respectfully submitted that the trial court erred as a matter of law when it denied Petitioner's motion to suppress the confessions obtained from him by Cincinnati Police Officers in the Campbell County, Kentucky Jail on November 19, 1974, and that said confessions were not proven by the State of Ohio to have been voluntarily given by the accused under the circumstances revealed in the record herein.

It is further submitted that his error was prejudicial to the Petitioner since his confession was the primary evidence offered against him at his trial to prove his involvement in this crime, the only other evidence being the uncorroborated deposition of William Mascus taken on May 16, 1975, which impeached his earlier deposition taken on April 17, 1975 and which thereby rendered his credibility unacceptable for purposes of proving the guilt of Jerry Jackson.

II.

RULE 11(C)(3) OF THE OHIO RULES OF CRIMINAL PROCEDURE WHICH EMPOWERS A TRIAL COURT TO DISMISS A SPECIFICATION CONTAINED IN AN INDICTMENT UPON ACCEPTANCE OF A PLEA OF GUILTY OR NO CONTEST AND IMPOSE SENTENCE ACCORDINGLY, IN THE INTERESTS OF JUSTICE, IN ONE CASE DENIED ANOTHER ACCUSED, PETITIONER, EQUAL PROTECTION OF THE LAW AND THE PROTECTION AGAINST CRUEL, UNUSUAL AND ARBITRARY PUNISHMENT WHEN THAT OTHER ACCUSED IS A CO-DEFENDANT TO THE SAME OFFENSE AND IS GRANTED THE OPPORTUNITY TO ENTER A PLEA OF GUILTY TO THE OFFENSE OF AGGRAVATED MURDER, THE SPECIFICATION BEING DISMISSED, RESULTING IN HIM RECEIVING A SENTENCE OF LIFE IMPRISONMENT, AND WHERE THE PETITIONER, BEING A CO-DEFENDANT IN THE SAME MATTER, IS DENIED THE SAME OPPORTUNITY AND IS COMPELLED TO RELY ON THE STATUTES OF OHIO REGULATING IMPOSITION OF THE SENTENCE FOR A CAPITAL OFFENSE AS CONTAINED IN SECTION 2929.03, OHIO REVISED CODE, AND THE CRITERIA FOR SUCH IMPOSITION AND MITIGATING CIRCUMSTANCES AND BURDEN OF SHOWING SUCH CIRCUMSTANCES AS CONTAINED IN SECTION 2929.04, OHIO REVISED CODE, ALL OF WHICH PLACES ON PETITIONER A BURDEN NOT PLACED ON HIS CO-DEFENDANT, AND WHICH FURTHER RAISES THE QUESTION OF A FATAL INCONSISTENCY BETWEEN THE RULE AND THE STATUTES, THEREBY ENABLING ONE ACCUSED TO BE GRANTED A BENEFIT ARBITRARILY DENIED ANOTHER.

The motion to dismiss the specification was first assigned before the beginning of the trial itself (R.76-92).

Rule 11(C)(3) of the Ohio Rules of Criminal Procedure provides in part as follows:

> "With respect to aggravated murder committed on or after January 1, 1974, the defendant shall plead separately to the charge and to each specification, if any. A plea of guilty or no contest to the charge waives the defendant's right to a jury trial and before accepting such plea the court shall so advise the defendant and determine that he understands the consequences of such plea. If the indictment contains no specification and a plea of guilty or no contest to the charge sentence provided by law. If the indictment contains one or more specifications, and a plea of guilty or no contest to the charge is accepted, the court may dismiss the specifications and impose sentence accordingly, in the interest of justice."
>
> (Emphasis added)

In the present case, a co-defendant, Curtis Palmore, jointly indicted with Jerry Jackson under Indictment No. B743479, was assigned by the usual roll of the dice to the Honorable Gilbert Bettman, Judge of the Court of Common Pleas, Hamilton County, Ohio. On April 21, 1975, the said Curtis Palmore appeared before Judge Bettman and entered a plea of guilty to Counts One and Two of the indictment, whereupon the court pursuant to said Rule 11(C)(4) [11(C)(3)] dismissed the specification of said indictment and sentenced Palmore to life imprisonment under Count One and seven to twenty-five years under Count Two, said sentences to run concurrently.

The transcript of said proceedings is a part of the record of these proceedings (R.338).

In *Furman v. Georgia*, 408 U.S. 238, the Supreme Court of the United States held that:

> "Imposition and carrying out of the death penalty in cases before the court would constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments."

Justice Douglas wrote:

> "It would seem to be incontestable that the death penalty inflicted on one defendant is unusual if it discriminates against him by reason of his race, religion, wealth, social position, or class, or if it is imposed under a procedure that gives room for the play of such prejudices."[408 U.S. 242]

On page 254 he further stated:

> "We cannot say from the facts disclosed in these records that there defendants were sentenced to death because they were black. Yet our task is not restricted to an effort to divine what motives impelled these death penalties. Rather, we deal with a system of discretion of judges or juries the determination whether defendants committing these crimes should die or be imprisoned. Under these laws no standards govern the selection of the penalty. People live or die, dependent on the whim of one man or of 12."

Justice Brennan on page 259, quoted Patrick Henry at the Virginia Convention in part:

> "But when we come to punishments, no latitude ought to be left, nor dependence put on the virtue of representatives."

On page 274 he further stated:

> "In determining whether a punishment comports with human dignity, we are aided also by a second principle inherent in the Clause -- that the State must not arbitrarily inflict a severe punishment. This principle derives from the notion that the State does not respect human dignity when, without reason, it inflicts upon some people a severe punishment that it does not inflict upon others. Indeed, the very words "cruel and unusual punishments" imply condemnation of the arbitrary infliction of severe punishments."

The irony of the situation is even heightened by Justice Brennan's statement at page 281:

> "It is unlikely that this court will confront a severe punishment that is obviously inflicted in wholly arbitrary fashion;"

Justice Stewart, at page 310, stated:

> "I simply conclude that the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed."

Justice White on page 314, stated:

> "Legislative 'policy' is thus necessarily defined not by what is legislatively authorized but by what juries and judges do in exercising the discretion so regularly conferred upon them. In my judgment what was done in these cases violated the Eighth Amendment."

Justice Marshall, in a lengthy opinion, commented at page 360:

> "In judging whether or not a given penalty is morally acceptable, most courts have said that the punishment is valid unless 'it shocks the conscious and sense of justice of the people."

What we are talking about in our particular case is not speculation, but an accomplished fact. Jerry Jackson and Curtis Palmore are equally guilty of murder as charged in the eyes of the law of Ohio, however, because of the roll of the dice, the method by which such cases are assigned to different judges, one man receives one judge and another man receives another, and as a result of that, one judge decides in the interest of justice, that he is going to dismiss the specification and give that man life imprisonment. This is exactly what Judge Bettman did in the Palmore case.

Judge Bettman on pages 17 to 20 of defendant's Exhibit E, stated as follows:

> "My abhorrence of capital punishment is of record, and in fact, despite my abhorrence to capital punishment, I intend to carry out my oath as a

Judge and execute the laws as they are written to the best of my knowledge and ability to. So, that is not, in any way, part of my consideration.

If I believed that on the basis of everything that I have learned in the courtroom, or through the Prosecutor or Defense, if I believed that this defendant, Palmore, was the man who shot Palmerantz [1], I would not accept his plea.

The policy of the State is on record, and I would not think it appropriate, however, to confirm or to elaborate and deepen my understanding of what the State's case was here, over the weekend I took the liberty of talking to Officer Sefton, of the Homicide Squad, who along with his partner, Officer Thompson, was in charge of the investigation and development of this case, and charged this defendant and the co-defendant, and Mascus, the other man who was picked up in Covington, along with them, it was Officer Sefton's judgment, which he said his partner concurred, that they did not think, of course, no one was there, and that there can be no certainty in this matter, but in their opinion, this defendant was not the man who shot Palmerantz.

Therefore, I think there are four reasons which compel my conclusion that an acceptance of a plea of guilty and dismissal of the specifications are in the interest of justice.

Number One, as I have mentioned, that all of the opinions that I have gathered are that this defendant did not kill Palmerantz.

Number Two, the defendant exhibited a willingness to testify in the other case, if the Prosecutor so desired.

Number Three, the fact that a plea of guilty entered this matter, contrasted with the chance which is involved in every trial, the length of this trial in this Court, the appeals to the Court of Appeals, the Supreme Court of Ohio, and the Supreme Court of the United States, all of which is, those of us who are familiar with the laws, which is after all, a human decision, can lead to all kinds of various possibilities, with all kinds of various results.

1/ The name of the victim, Pomerantz, has been incorrectly spelled as Palmerantz in this portion of the record.

> This contract, of the possibilities, with a certainty that a guilty plea is a termination of this matter.
>
> And, finally, I think one has to bear in mind that there is a lack of certainty, that the Ohio Capital Punishment Statute is constitutional for capital punishment in the United States. There is, by all means, certain cases which are pending in the Supreme Court of United States now. What the Supreme Court actually means by Furman versus Georgia is subject to debate by much more learned legal scholars than any of us here, and no one can predict the results.
>
> So, to put the State through this endless argument, only to arrive at the same point we are arriving at right here this morning seems to me, not in the interest of justice, and therefore I am prepared, after the acceptance of the plea, I am prepared to order the specification dismissed."

Further on, at page 26 of defendant's Exhibit E, Detective Frank Sefton was placed on the stand and was examined by the court, along with the prosecutor and defense counsel, through (R-29). Here again, Judge Bettman relied upon the opinion of a police officer who had investigated the case.

Later on in said proceedings, the prosecutor requested a hearing in accordance with Section 2929.04, Ohio Revised Code, to determine whether the death penalty should, or should not be imposed. It is obvious from the record that no such hearing was ever held nor was even contemplated.

At the conclusion of the State's case, the motion to dismiss the specification was renewed along with the offer to plead guilty to Aggravated Murder, contingent upon the dismissal of the specification, and imposition of a life sentence. (R.338). Said motion was overruled and the plea

rejected. Said motion was argued from (R.338 through 343).

As previously stated, Judge Bettman based his action upon four reasons, the first of which was that based upon opinions of police officers and others, that he did not believe that Palmore killed Pomerantz. All of the evidence produced during the trial added up to one thing -- that Palmore was the trigger man.

Judge Bettman's second reason was Palmore's willingness to testify in the other case, if the prosecutor so desired. At (R.340) of the record it was proposed by commitment that Jerry Jackson would testify in any other case involved in the incident.

Judge Bettman's reason Number Three considered the length of the trial and appeals, etc. We submit that acting in the interest of justice in expediency, not justice, and that expediency did not determine the progress of Jerry Jackson's trial, so therefore in the interest of justice the trial court should not be controlled by expediency, but by the justice of the situation as far as Jerry Jackson is concerned.

The fourth reason given by the judge concerned the whole question of capital punishment. Likewise, it was argued as follows on (R.341 through 343) of the trial record:

> "So if there is any benefit in the interest of justice that was accorded to Curtis Palmore, then it certainly should be accorded to Jerry Jackson, because that is the ultimate question as to how this will be decided. What we are now asking you, sirs, is that Jerry Jackson not be treated any differently. We are asking that he be given equal

treatment under the law, equal protection under the law. It boils down to this, and it is important. One, if the law of Ohio, as it now stands, if it is constitutional, and by that I mean that it is not arbitrary, it is not whimsical, it is not discretionary, then you must answer it and say what is in the interest of justice. This is rather a vague thing, I know, and what would be in the interest of justice in one case may not be in another. But in this particular case with two defendants equally charged, we have to have some standard to know what the interest of justice may be. And in this case we have at least an expression, and I would ask you to draw the line between Palmore and Jackson, as to how or why, under these standards, which are the only standards we have at this time, that have been so expressed, that why Jackson should be treated differently than Palmore, especially in the light of all the evidence there is in this case.

Now, if you answer the second question, and you say we are now going to follow these standards, in fact, at this point, you go back and answer the first question, because if you are not going to follow these standards, then I think it's clearly demonstrated that the law involving capital punishment in Ohio is arbitrary, discretionary according to dictates, or wishes of one man. This is exactly where we are.

It is as simple as that. It's kind of a Russian roulette, and you have to consider these things in turn. These things have to be considered in the record, therefore, we move the specification be dismissed on the basis it is unconstitutional, and in the alternative, if it is not dismissed, that it is held by this court to be constitutional, then in the interest of justice, by the standards that have been at least set in this particular case, that Jerry Jackson far better meets, and is far more deserving under these standards than Palmore was. We ask that his plea of guilty to aggravated murder be accepted with a commitment, the understanding, the contingency, that the specification will be dismissed. This is exactly what was done in the other case because not once, but four times, or more, it appears in the record that you now have into evidence, that this is exactly the way it was done."

The motion to dismiss the specification and permit the defendant to enter a plea of guilty to the crime of Aggravated

Murder was again renewed on behalf of the defendant at (R.390) and overruled as all the others were.

The matter is even more complicated by the fact that a third person, William Mascus, whose testimony by deposition was admitted in this trial (R.253-306). As a result of said deposition that was placed in evidence, William Mascus was later indicted for the same robbery-killing involving Curtis Palmore and Jerry Jackson and has been convicted of Aggravated Murder and the specification and was sentenced to life imprisonment, a hearing on mitigation under Section 2929.03 and 2929.04 of the Ohio Revised Code.

The joint decision and opinion of the Court of Appeals for the First Appellate District of Ohio, which is attached hereto as a part of the appendix [A.9-23],clearly illustrates the futility and injustice of the situation created by Criminal Rule 11(C)(4), now titled Rule 11(C)(3). In effect they ruled that what Judge Bettman did in the trial court as far as Palmore is concerned, was not in the "interest of justice."

Thus, we now have an opinion by a Judge of the Court of Common Pleas, Judge Bettman, as to what he thinks is in the interest of justice and also an opinion by the three judges of the First District Court of Appeals, Hamilton County, Ohio, as to what they think is in the "open interest of justice". The Court of Appeals apparently feels that the Criminal Rule in question contemplated plea bargaining between the State and the defendant and also, might well be the dismissal of a specification which, for one reason or another, is deficient

as a matter of law. They further state in their opinion on page 11, "in both instances (which we do not necessarily insist are exclusive), the dismissal of a specification serves the 'interest of justice' without at the same time providing an opportunity for the exercise of the kind of discretion which may work in arbitrary or capricious result in the treatment accorded different defendants in an otherwise similar posture."

In effect, what they are saying is that they feel that there are at least two instances contemplated by the Criminal Rule, however, there may be more, which would serve the "interest of justice" without at the same time providing an opportunity for the exercise of the kind of discretion that was exercised in the Palmore case. It is obvious that this is just the kind of situation the Supreme Court of the United States was concerned about in *Furman v. Georgia*.

In summary, gentlemen, Jerry Jackson is sentenced to die in the electric chair, while another man, Curtis Palmore, was sentenced to life imprisonment and subsequently remanded back to the trial court for trial. Therefore, you must ask yourselves this question: Does the law of Ohio permit a situation where:

> People live or die, dependent upon the whim of one man or of twelve?

Does the law of Ohio permit the State to arbitrarily inflict a severe punishment, when without reason, it inflicts a death sentence upon Jerry Jackson, which it may or may not inflict upon Curtis Palmore, depending on what is in "the

interest of justice"? Cruel and unusual punishment imply condemnation of arbitrary infliction of severe punishment.

After reading the record concerning the proceedings involving Curtis Palmore and the opinion of the Court of Appeals, can this court or any court say to Jerry Jackson that the death sentence imposed upon him is not wholly arbitrary?

To quote Justice Stewart again (408 U.S. 310):

> "I simply conclude that the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty be so wantonly and so freakishly imposed."

The death sentence of Jerry Jackson was wantonly and freakishly imposed, for all we have now is a difference of opinion as to what "in the interest of justice" means.

From the aforementioned argument there can be but one conclusion, that the provisions of Section 2929.02, 2929.03 and 2929.04 of the Ohio Revised Code, along with Rule 11(C)(4) [11(C)(3)], Ohio Rules of Criminal Procedure, unconstitutionally permit the imposition of the death penalty in violation of the Eighth and Fourteenth Amendments to the Constitution of the United States and in violation of Article One, Paragraph Nine of the Ohio Constitution.

The Ohio procedure for implementation of the death penalty provides no meaningful appellate review of the appropriateness of the death sentence. One of the salutory features of the Georgia death penalty statutes cited by the Court in *Gregg v. Georgia*, 428 U.S. 153 (1976), is the use

of the appellate process on a state-wide basis to review each death sentence vis-a-vis other death sentences so that in cases where the ultimate sanction of death is imposed, its imposition is not disproportionately severe compared with other death sentences imposed throughout the jurisdiction. Such appellate review mitigates against the arbitrary and capricious imposition of the death penalty. The Georgia plan requires each trial judge in a capital case to complete a questionaire regarding the relevant circumstances of the case so that the state supreme court has a meaningful basis on which to compare death sentences imposed throughout the state.

This Court has also approved the appellate review of capital sentences as practices in the State of Florida, where review of that state's capital sentences by the state's highest court resulted in the reduction of the death penalty to life imprisonment in 8 of 21 cases, *Proffitt v. Florida*, 428 U.S. 242 (1976).

Under Ohio law and practice however, there is no meaningful appellate review on a state-wide basis of the appropriateness of each death sentence, either individually, or on a case-by-case comparison. By contrast with the Florida experience, to the Petitioner's knowledge the Ohio Supreme Court to date has reviewed over 26 cases in which the death penalty was imposed. The death sentence was upheld in at least 25 of these cases and one known case was reversed for a new trial on grounds not related to the penalty or the manner of its imposition. (*State v. Lockett*, 49 O.S.2d 71

(1976) Thus, in every capital case in which it has upheld the conviction, the Ohio Supreme Court has affirmed the death sentence.

In Ohio, appellate courts have never reviewed the appropriateness of the sentence in a criminal case as long as the sentence imposed was within the limitations prescribed by statute, *City of Toledo v. Reasonover*, 5 O.S.2d 22, 213 N.E. 2d 179. One frequently cited Ohio authority, Ohio Jurisprudence 2d, goes further and statutes that in Ohio appellate courts do not have jurisdiction to review sentences which are within the statutory parameters, 4 O.Jur.2d, Appellate Review, §1159. In a pre-*Furman* case, this Court recognized that Ohio law prohibited reduction of a jury's death sentence by either the trial or an appellate court, *McGautha v. California*, 402 U.S. 183 (1971), and *Crampton v. Ohio*, 402 U.S. 183, 195 n.7 (1971). The death sentence as imposed by a three judge panel prior to *Furman* was also not reviewable, *State v. Stewart*, 176 O.S. 156, 198 N.E.2d 439 (1964), and *State v. Ferguson*, 175 O.S. 390, 195 N.E.2d 794 (1964).

In its first decision in a case where a capital sentence was imposed under the new statutory scheme here under attack, *State v. Bayless*, 48 O.S.2d 73 (1976), at 86, the Ohio Supreme Court promised that it would "independently review the aggravating and mitigating circumstances presented by the facts of each case to assure ourselves that capital sentences are fairly imposed by Ohio's trial judges." However, examination of the Ohio Supreme Court's opinions in over 26

capital cases reviewed since *Bayless* indicates that no comparison of any death sentence imposed with any other as is done in Georgia, has even been attempted by the Ohio Supreme Court, and its scrutiny of the facts of the individual cases before it is inadequate to assure reliable, non-arbitrary sentencing decisions at the trial level.

The failure of the Ohio Supreme Court to give adequate review for Eighth Amendment purposes of its capital sentences stems from the long-standing Ohio doctrine that appellate courts are not free to disturb findings of fact made by a trial court, *Feterle v. Huettner*, 28 O.S.2d 54, 275 N.E.2d 340 (1971), *Gillen-Crow Pharmacies, Inc. v. Mandzak*, 5 O.S. 2d 201, 215 N.E.2d 377 (1966).

The Ohio Supreme Court has stated bluntly in a capital case that the mitigating circumstances are facts, and that ". . . in criminal appeals this court will not retry issues of fact [relating to mitigation]. In the circumstances at hand, we confine our consideration to a determination of whether there is sufficient substantial evidence to support the verdict rendered," *State v. Edwards*, 49 O.S.2d 31, 47, 458 N.E.2d 1051 at 1062 (Emphasis added).

Petitioner respectfully suggests that review of a capital sentence is not a situation in which a state's highest Court should "confine its consideration" in any respect. Further, the "substantial evidence" test to which the Ohio court referred was cited in *Edwards, supra*, as being the same as the test set forth in *State v. Cliff*, 19 O.S.2d 31, 249 N.E.

2d 823 (1960), a pre-*Furman* capital case. That test is so narrow as to be totally useless in assuring that Ohio's death sentences are consistently and fairly applied, for the test is that the death sentence will be upheld unless no reasonable mind could reach the same conclusion!

The Ohio Supreme Court is also limited in its consideration by the fact that the mitigating circumstances are those which will probably require testimony to establish, particularly with respect to the only offender-oriented mitigation, that of the presence of psychosis or mental deficiency as a primary cause of the offense. This being the case, the credibility of the witness becomes of great significance; however, the Ohio Supremc Court will not assess the credibility of witnesses upon review. *State v. Antill*, 176 O.S. 61, 197 N.E.2d 548 (1964).

The rigid adherence by the Ohio Supreme Court to the doctrine that it will not retry the existence of the mitigating facts nor reverse the finding by trial courts as to those facts unless no reasonable person could agree, and to the doctrine that the credibility of witnesses, including those called to testify at the penalty trial, is exclusively for the trier of the fact, assures that no meaningful appellate review of capital sentences on a case-by-case basis at the state-wide level is possible. That every death sentence reviewed by the Ohio Supreme Court (over 26 at the date of this writing) has been upheld where the conviction upon which it is based is affirmed, indicates that there is no meaningful

appellate review, and as a result, the narrow and rigid strictures limiting the trier of the fact at the penalty trial level are not subject to correction at the appellate level.

If there were some discretion in the Ohio capital sentencing process at some point in that process, factors which this Court has held to be important and constitutionally required as part of the procedure for imposing the death penalty might have a meaningful impact on the capital decision. As the trial courts are precluded from considering the character and record of the offender as a determinative factor in the life or death decision of sentencing in a capital case, the Ohio appellate courts, including the Ohio Supreme Court, are without the authority or inclination to consider such factors in reviewing the appropriateness of the sentences in capital cases. Such a system offends the Eighth and Fourteenth Amendments to the Constitution of the United States and cannot be permitted to continue.

CONCLUSION

For the reasons already stated, the decision of the Supreme Court of Ohio affirming the Petitioner's conviction and sentence violated the rights guaranteed to him by the United States and Ohio Constitutions and the cases previously decided by this Court.

There is a definite conflict between Sections 2929.02 through 2929.04, Ohio Revised Code, and Ohio Criminal Rule 11(C)(3) which permits one accused to be spared from the effects of capital punishment upon a plea while another accused, as an aider and abettor in the same offense, is denied that opportunity by having had the misfortune of his case being assigned to a different tribunal for trial, and thus being denied the opportunity to enter the plea afforded his co-defendant leaving his only avenue the very restricted and burdensome mitigating circumstances set forth in Section 2929.04, Ohio Revised Code.

The effect of this inequity is to deny one equal protection of the law arbitrarily afforded to another when the law mandates that they should stand before the bar of an equal footing.

Respectfully submitted,

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THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO,
City of Columbus.

19 77 TERM

To wit: July 8, 1977

State of Ohio,
Appellee,

vs.

Jerry Jackson,
Appellant.

No. 77-147

REHEARING

It is ordered by the court that rehearing in this case is denied.

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I, THOMAS L. STARTZMAN, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing entry was correctly copied from the records of said Court, to wit, from Journal No.....Page.....

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of the Supreme Court this 8th *day of* July *19* 77

THOMAS L. STARTZMAN *Clerk.*

By .....Deputy.

Statement of the Case.

THE STATE OF OHIO, APPELLEE, *v.* JACKSON, APPELLANT.

[Cite as State v. Jackson (1977), 50 Ohio St. 2d 253.]

Criminal law—Aggravated murder—Confession—Voluntariness—Witnessess—Failure to produce, not prejudicial, when—Plea-bargaining—Constitutionality.

(No. 77-147—Decided June 22, 1977.)

APPEAL from the Court of Appeals for Hamilton County.

According to a statement given by appellant to Cincinnati police (tape recorded and entered into evidence at trial below), appellant Jerry Jackson and Curtis Palmore, at approximately 7:45 p. m. on November 14, 1974, approached the service station where Charles Pomerantz was working. Appellant and Palmore intended to rob the attendant at the station. While appellant deliberately diverted the attention of Pomerantz from Palmore, to facilitate the robbery, Palmore shot Pomerantz. Palmore then removed Pomerantz's wallet from his pocket, and when the two left the scene they took the wallet and the service station money box with them.

Palmore's father testified that on November 18, 1974, he found a library card and a driver's license, both bearing the name of Charles Pomerantz, among his son's personal effects. He turned the items over to Cincinnati police officers, and testified at trial that on the evening of November 14, 1974, appellant and Palmore had conversed in the latter's house, and that the two had departed the house together before 8:00 p. m.

Cincinnati detective Frank Sefton testified that appellant's statement of November 19, 1974, was taken while appellant was in custody, and that Sefton already had told appellant that the police had two witnesses to the Pomerantz crime who could identify a suspect. Sefton testified that he already had played appellant a recording in which

Curtis Palmore named appellant as Pomerantz's killer. Sefton also had told appellant that Curtis had named appellant as the party who had taken the service station cash box.

On December 6, 1974, the Hamilton County Grand Jury returned a two count indictment, with a specification as to the first count, jointly charging appellant and Palmore with aggravated murder and aggravated robbery. Appellant waived his right to trial by jury and a three judge panel found him guilty as charged. On September 11, 1975, the panel unanimously found that none of the mitigating circumstances in R. C. 2929.04(B) had been established by a preponderance of the evidence, and sentenced him to a term of from seven to twenty-five years for his aggravated robbery offense, and to death for his aggravated murder offense. On December 13, 1976, the Court of Appeals for Hamilton County affirmed appellant's conviction.

The cause is now before this court as a matter of right, pursuant to Section 2(B)2(a)(ii) of Article IV of the Constitution of Ohio.

Mr. Simon L. Leis, Jr., prosecuting attorney, *Mr. Robert R. Hastings, Jr.* and *Mr. William P. Whalen, Jr.*, for appellee.

Mr. Albert J. Mestemaker and *Mr. Donald G. Montfort*, for appellant.

I.

Per Curiam. Appellant contends that the trial court erred in denying his motion to suppress the statement obtained from him by police on November 19, 1974. The question herein is not whether the interrogating officers properly advised him of his constitutional rights, but whether they ignored those rights after advising appellant of them.

Appellant submits that where a police officer, in an in-custodial setting, tells a homicide suspect that all other possible accomplices already have confessed and implicated the suspect, and plays a recording to prove this, informs the accused that two witnesses can identify him, and shows

the suspect evidence removed from the decedent which identifies the suspect, that in that event the officer has so manipulated the suspect as to overcome him by improper influence and a form of coercion. We disagree.

Appellant relies heavily upon *People* v. *Fioritto* (1968), 68 Cal. 2d 714, 441 P. 2d 625. In that case, the sole issue was the admissibility of the confession of a criminal defendant; central thereto was whether his confession was admissible if elicited after the defendant initially had refused to waive his constitutional rights. The Supreme Court of California determined that, under the facts of that case and pursuant to the explicit directives of *Miranda* v. *Arizona* (1966), 384 U. S. 436, the confession was inadmissible.[1]

Although the Supreme Court of California discerned no alternative to holding the *Fioritto* confession inadmissible, it pointedly continued: "In so holding, we prohibit only continued questioning after an individual has *once* asserted his constitutional rights. We do not, of course, disapprove of the use of statements, whether admissions or confessions, voluntarily initiated by a suspect. Such statements had been repeatedly sanctioned in the decisions of this court * * * and are also expressly authorized in the *Miranda* opinion." *Id.*, at page 719.

The case at bar sharply contrasts with *Fioritto*. Appellant did not initially assert any constitutional right and the record shows that his confession was voluntarily initiated by him.

The instant case is less a parallel to *Fioritto* than to *State* v. *Black* (1976), 48 Ohio St. 2d 262, 358 N. E. 2d 551. In *Black*, a homicide defendant's confession "resulted from

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[1]"Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise. Without the right to cut off questioning, the setting of in-custody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has been once invoked." *Miranda* v. *Arizona* (1966), 384 U. S. 436, 473-74.

the defendant's independent decision to speak after being confronted at his own request by those of his friends and associates who were aware of his involvement in the crimes and by his father whom he possibly wished to warn of his impending confession and to whom he asserted that the homicide was accidental rather than purposeful. The statements made to him by * * * [an alleged accomplice] that he was going to 'tell the truth' triggered his decision to speak rather than inquisitorial proceedings. The circumstances show no 'over-zealous police' * * * no hostile atmosphere. The statements which resulted merely confirmed persuasive and compelling evidence of guilt." *Black, supra,* at page 266.

As this court held in the fourth paragraph of the syllabus in *Black*:

"Where the warnings mandated by *Miranda* * * * have been given and fully honored, a confession which results from the defendant's independent decision to speak is voluntary although it was made to police officers, while in custody, and in answer to an examination conducted by them.'" This proposition of law is overruled.

II.

Appellant avers further that it is incumbent upon the state to produce as a witness any law enforcement officer who in any fashion participated in an interrogation resulting in a confession which the state presents as evidence, and that when a confession challenged as involuntary is sought to be used at trial against a criminal defendant, the defendant is entitled to a reliable and clear-cut determination that his confession was voluntarily rendered.

The case relied upon by appellant on this point is *State* v. *Davis* (1968), 73 Wash. 2d 271, 438 P. 2d 185. Therein,

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"'In dealing with statements obtained through interrogation, we do not purport to find all confessions inadmissible. Confessions remain a proper element in law enforcement. Any statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence. * * * Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today." *Miranda* v. *Arizona, supra,* at page 478.

the defendant argued that because he denied the state's version of his alleged admissions, and because a witness included on the list of prosecution witnesses was neither called by the prosecution nor his absence explained, the trial court erred in refusing to instruct the jury on the missing witness rule, *i. e.*, that the failure of the state to produce this witness to verify the defendant's waiver of his constitutional rights raised an inference that this prospective witness' testimony would have been unfavorable to the state. *Davis* stated that when the missing witness rule is applicable, the jury should be instructed that it may draw an unfavorable inference against the party failing to call the missing witness, if the jury believes such inference warranted under all the circumstances. *Id.*, at page 281. However, the inference is permissive.

The failure to bring a witness before the court when either party claims that the facts would thereby be elucidated usually gives rise to an inference that the failing party fears to bring the witness forth. This fear suggests that the witness would have exposed facts unfavorable to the failing party.[2] But as this court has held relative to Crim. R. 16(B)(4)[3]: "A party is not required to use every prospective witness it may have. Once the prosecution has established its case, it may rest at the point it chooses." *State* v. *Edwards* (1976), 49 Ohio St. 2d 31, 44, 358 N. E. 2d 1051. The missing witness rule applies to inferences, and the weight to be accorded the inference is a matter for the trial court and not a basis for reversal if, as in the instant case,

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[2]"The failure to bring before the tribunal some circumstance, document, or witness, when either the party himself or his opponent claims that the facts would thereby be elucidated, serves to indicate, as the most natural inference, that the party fears to do so, and this fear is some evidence that the circumstance or document or witness, if brought, would have exposed facts unfavorable to the party. * * * [T]he propriety of such an inference in general is not doubted." 2 Wigmore on Evidence (3 Ed.), 162, Section 285 (1940).

[3]Crim. R. 16(B)(4) provides:

"The fact that a witness' name is on a list furnished under subsections (B)(1)(b) and (f), and that such witness is not called shall not be commented upon at the trial."

there is evidence from which that court could find the challenged statement voluntary. This proposition of law is overruled.

III.

Appellant contends finally that R. C. 2929.02 (providing penalties for murder), R. C. 2929.03 (providing for the imposition of sentence for capital offenses), and R. C. 2929.04 (providing criteria for imposing death or imprisonment for capital offenses), are violative of the Eighth and Fourteenth Amendments to the United States Constitution. Appellant argues that his sentence pursuant thereto was arbitrarily, wantonly, and freakishly imposed, this being inconsistent with the requirements outlined in *Furman* v. *Georgia* (1972), 408 U. S. 238.

In the instant case, none of the mitigating circumstances listed in R. C. 2929.04(B) was established by preponderance of the evidence. However, appellant asserts that since his accomplice, Palmore, enjoyed the dismissal of the specification from his indictment and received the sentence of life imprisonment for murder,[*] appellant's motion to allow him to plead guilty to the murder charge, contingent upon dismissal of the specification and the imposition of a life sentence, should also have been granted. Because appellant's gambit was not accepted, and Palmore's apparently was, appellant proposes that his death sentence was arbitrary.

Neither the United States Supreme Court nor this court has held plea-bargaining with a defendant in exchange for the defendant's testimony unconstitutional. We find no constitutional duty upon the state to accept guilty pleas in exchange for more lenient sentencing, even if an accomplice already has plea-bargained successfully for the lighter sentence. As a practical matter, it is questionable whether the prosecution's plea-bargaining position relative to subsequently-tried accomplices might not be seriously eroded,

[*]Palmore entered a guilty plea to the murder count and the trial court found him willing to testify at the behest of the state.

if the state were bound to acquiesce in gentler sentences in exchange for the guilty pleas of all subsequently-tried accomplices, once the first plea-bargain had been reached.

There is no requirement under *Furman* for the state more lightly to punish defendants insisting upon guilty pleas. "*Furman* mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." *Gregg* v. *Georgia* (1976), 428 U. S. 153, 189. Denial of a plea-bargain to a defendant indicted for a capital offense is not at all arbitrary or capricious; it is consistent with statutes and rules of court directing the prosecution and punishment of criminals.[*]

Our examination of the record in the instant case confirms that the sentencing authority focused on the particular circumstances of this appellant and his crime. This proposition of law is overruled and the judgment of the Court of Appeals is affirmed.

Judgment affirmed.

O'Neill, C. J., Herbert, Celebrezze, W. Brown, P. Brown, Sweeney and Locher, JJ., concur.

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[*]For example, Crim. R. 11(C)(3) provides, in relevant part:

"With respect to aggravated murder committed on and after January 1, 1974, the defendant shall plead separately to the charge and to each specification, if any. A plea of guilty or no contest to the charge waives the defendant's right to a jury trial, and before accepting such plea the court shall so advise the defendant and determine that he understands the consequences of such plea.

"If the indictment contains no specification, and a plea of guilty or no contest to the charge is accepted, the court shall impose the sentence provided by law.

"If the indictment contains one or more specifications, and a plea of guilty or no contest to the charge is accepted, the court may dismiss the specifications and impose sentence accordingly, in the interests of justice."

75231 75519

IN THE COURT OF APPEALS

FIRST APPELLATE DISTRICT OF OHIO

HAMILTON COUNTY, OHIO

STATE OF OHIO,	:	NO. C-75231
Plaintiff-Appellant,	:	
vs.	:	DECISION.
CURTIS PALMORE,	:	
Defendant-Appellee.	:	

Messrs. Simon L. Leis, Jr., Leonard Kirschner and Robert R. Hastings, Jr., 420 Hamilton County Courthouse, Court & Main Streets, Cincinnati, Ohio, for Plaintiff-Appellant,

Messrs. Leslie Gaines, Jr., 906 Main Street, Cincinnati, Ohio 45202, and Robert Davis, 714 Executive Building, 35 E. Seventh Street, Cincinnati, Ohio 45202, for Defendant-Appellee.

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STATE OF OHIO,	:	NO. C-75519
Plaintiff-Appellee,	:	
vs.	:	DECISION.
JERRY JACKSON,	:	
Defendant-Appellant.	:	

Messrs. Simon L. Leis, Jr., Robert R. Hastings, Jr. and William P. Whalen, Jr., 420 Hamilton County Courthouse, Court & Main Streets, Cincinnati, Ohio 45202, for Plaintiff-Appellee,

Messrs. Albert J. Mestemaker and Donald G. Monfort, 2312 Kroger Building, 1014 Vine Street, Cincinnati, Ohio 45202, for Defendant-Appellant.

PER CURIAM.

These causes came on to be heard upon the appeals, the transcripts of the docket and journal entries, the original papers and pleadings from the Court of Common Pleas of Hamilton County, the transcripts of the proceedings, the assignments of error, the briefs and the arguments of counsel.

On December 6, 1974, the Hamilton County, Ohio Grand Jury returned a two count indictment with a specification as to the first count charging the appellants, Curtis Palmore and Jerry Jackson, with aggravated murder and aggravated robbery. The charges against Palmore and Jackson were disposed of in separate proceedings, but their appeals are so interrelated that we have elected to consider them jointly.

At about 8:00 P.M., November 14, 1974, a seventeen year old youth, Charles Pomerantz, was working as the sole attendant in a gasoline service station in an inner city area of Cincinnati. At the same time Palmore, Jackson and a third man, William Mascus, were seated in a car belonging to Palmore which was parked in a lot adjacent to the service station. Essentially, it is unquestioned that Palmore and Jackson entered the station and conversed with Charles Pomerantz about tires. During the course of the discussion, Charles Pomerantz was shot in the back of his head with a .22 caliber pistol and died without regaining consciousness three days later as a consequence of the wound.

Police investigation established that Pomerantz's wallet had been taken from him. Additionally, the money changer which he had carried and the cash box in the station with its contents consisting

of rolls of coins were also missing.

On November 18, 1974, Palmore, Jackson and Mascus were arrested in Kentucky in connection with another alleged armed robbery. After the authorities in Kentucky advised Cincinnati police of those arrests, detectives from Cincinnati interrogated all three men. Palmore admitted that he participated in the robbery of the service station but indicated that Jackson had shot Charles Pomerantz. Jackson stated that he and Palmore had committed the robbery but denied that he had done the shooting.

Also, on November 18, 1974, the father of Palmore had found a shoe box in a closet of the residence he shared with his son and had examined its contents. The elder Palmore had found a number of cards and documents bearing the name of Charles Pomerantz. Because he had read of the death of Pomerantz, ultimately he summoned police officers who took the materials.

The trial of Palmore on the indictments was set for April 21, 1975. On that date at the outset of the proceedings, this colloquy occurred:

" JUDGE BETTMAN: Mr. Davis, I believe you have an oral motion to present?

MR. DAVIS: Your Honor, as I indicated to your Bailiff, before we begin with the Jury selection, on behalf of the defendant, there is an oral motion we would like to make, which will be reduced to writing later. In this time situation, as such, we are requesting to make this motion orally.

The motion is simply this, Your Honor, that at this time we are making a pre-trial motion on behalf of the defendant,

Curtis Palmore, to dismiss the specification, one of aggravation as contained in the indictment in this particular matter. If that motion would be granted, the defendant would withdraw his plea of not guilty as previously entered, and would tender an acceptance on that plea and tender to the Court a plea of guilty to Counts One and Two of the indictment.

The motion is being made pursuant to Rule 11 of the Ohio Rules of Criminal Procedure, and more particularly, subparagraph C-4, and paragraphs 1 and 3 of that subparagraph. " [1]

The prosecuting attorney objected to the suggested procedure, urging that any plea of guilty should be tendered and accepted without reservation. That protest, however, was rejected and Palmore, through counsel, entered a plea of guilty to the first (aggravated murder) and second (aggravated robbery) counts of the indictment.

After further discussion, the court embarked upon a personal interrogation of Palmore to determine whether he understood the significance of his plea and its consequences. Here, the prosecutor requested that he be admonished that "the death penalty is a potential penalty by virtue of his plea . . . ." To this the court responded by stating:

" JUDGE BETTMAN: Well, the Court has stated in open Court that on the acceptance of the plea, provided by the rules, the Court will then, under the rules, dismiss the specification. If the Courts, and some Appellate Courts feel the Court does not have authority to do that, I think it would obviously negate the whole proceeding and have to start over. "

This utterance prompted the prosecutor to restate his objection, which evoked the following, from one of defense counsel:

" MR. GAINES: May we respond? One of the paramount conditions of tendering a plea is this defendant understanding that the death penalty will not be imposed, and that the Court dismiss the specification. That is the underlying basis of this plea. "

Ultimately, the court sentenced Palmore "to be confined in the Ohio Penitentiary for the balance of (his) life" on the first count of the indictment, and for a term of 7 to 25 years on the second, the terms to "run concurrently." Then, without more, the court ordered that the specification, in the interest of justice and in harmony with its earlier declarations, be dismissed.

On May 19, 1975, Jackson's trial commenced before a panel of three judges of the Court of Common Pleas of Hamilton County. Some weeks before, Jackson had moved the panel to dismiss the specification of aggravated circumstances and to proceed in his case in the manner adopted by the trial judge in Palmore's case. The panel overruled that motion. On the day of trial Jackson again offered in writing to tender a plea of guilty to both counts of the indictment on the condition that the panel dismiss the specification of aggravated circumstances and sentence him as Palmore had been sentenced. The written offer was coupled with an appropriate separate motion and, ultimately, both applications were denied.

The cause then proceeded to trial with the State of Ohio offering evidence in support of its accusations against the defendant-appellant. At the conclusion of the State's case in chief,

among other exhibits offered and accepted, the trial court received into evidence on behalf of the defendant-appellant a transcript of the proceedings had before Judge Bettman in the case of Curtis Palmore.

Thereafter, the State having rested its case, the court heard and denied a motion for judgment of acquittal and also heard again and denied again defendant-appellant's motion to be permitted to enter a plea of guilty to the indictment in exchange for dismissal of the specification of aggravated circumstances and a sentence of life imprisonment as to Count One as had been done in the case of Palmore.

At the conclusion of the defendant's case in chief, no rebuttal testimony being offered by the State, the defendant-appellant once again offered to plead guilty to the indictment, provided the trial court would dismiss the specification of aggravated circumstances and sentence him to life imprisonment. This motion was again denied by the trial court.

After argument the three judge trial panel found the defendant-appellant guilty of aggravated murder and aggravated robbery, with the specification of aggravated circumstances. The court thereupon ordered a presentence examination and psychiatric evaluation as prescribed by Ohio Revised Code Section 2929.03(D).

On September 11, 1975, the trial court sentenced the defendant-appellant, Jackson, to death for the offense of aggravated murder and to serve a term of seven to twenty-five years for the offense of aggravated robbery.

With respect to the within appeal numbered C-75231, (Palmore),

the State of Ohio sought and was granted leave to appeal and has assigned the following four errors:

> 1. The trial court erred when it entered into plea negotiations with defense counsel over the objections of the prosecutor.
>
> 2. The trial court erred when it agreed to dismiss the specifications in said indictment prior to the plea of guilty being entered and over the objection of the prosecutor.
>
> 3. The trial court erred when it exercised the executive function of the prosecutor in negotiating a plea of guilty to the charge of aggravated murder conditioned upon the fact that the specifications would be dismissed; all without the consent or concurrence; and in fact the objection of, the prosecutor.
>
> 4. The trial court erred in dismissing the specifications prior to the plea of guilty and without evidence being offered.

The appellant, Jackson, asserts two assignments of error, the first of which is:

> The trial court erred to the prejudice of defendant-appellant in denying defendant-appellant's motion to suppress the statements obtained from him by officers of the Cincinnati Police Division on November 19, 1974.

His second assignment of error, together with the issue he urges as presented for review makes apparent the propriety of our consideration of these appeals simultaneously.

The assignment is given as:

> The trial court committed prejudicial error in overruling motions to dismiss the specifications to the first count of the indictment in that Sections 2929.02, 2929.03 and 2929.04, Ohio Revised Code, are unconstitutional and violate the Eighth and Fourteenth Amendments to the Constitution of the United States of America.

The issue as submitted is:

> The acceptance of a plea by the court under Ohio law to aggravated murder with the condition that the specification of aggravated circumstances will be dismissed, thus sparing

one accused from the death penalty, violates a co-defendant's rights to equal protection of the laws when another court in the same jurisdiction and in the same case refuses to accept his plea with the same condition and the same protection being afforded denied to him.

In support of its assignments of error *in toto*, the State in Palmore urges that before a judge can dismiss a specification in an indictment charging aggravated murder the accused must enter an unqualified plea of guilty. Secondarily, the prosecutor argues that a judge may not "on his own" enter into plea bargaining with counsel for the accused where the State objects.

Rule 11(C)(3), Ohio Rules of Civil Procedure, provides in pertinent part:

> " (3) With respect to aggravated murder committed on and after January 1, 1974, the defendant shall plead separately to the charge and to each specification, if any....
>
> ....
>
> If the indictment contains one or more specifications, and a plea of guilty or no contest to the charge is accepted, the court may dismiss the specifications and impose sentence accordingly, in the interests of justice."

From this the prosecutor concludes that the court below did not have "jurisdiction" to dismiss the specification until Palmore's plea of guilty had been made and received.

We view the extraordinary procedure adopted by the court in its disposition of the charges and specification presented against Palmore as raising the issue of discriminatory application of the death penalty.

This Court has decided in a line of cases beginning with *State v. Reaves*, No. C-75022 (1st Dist. January 26, 1976, unreported) and *State v. Woods*, No. C-75047 (1st Dist. January 26, 1976, unreported),

both affirmed by the Ohio Supreme Court at 48 Ohio St. 2d 127 (1976), and including *State v. Bell*, No. C-75068 (1st Dist. April 12, 1976, unreported), and *State v. Hall*, C-75171 (1st Dist. April 12, 1976, unreported), that: (a) the Ohio statutes imposing the death penalty do not permit arbitrary, discriminatory, and freakish application thereof and thus meet constitutional muster under *Furman v. Georgia*, 408 U.S. 238 (1972); and (b) that those same statutes do not impose cruel and unusual punishment contrary to the Federal and State Constitutions.

The Ohio Supreme Court has more recently reached the same conclusion in *State v. Bayless* (1976), 48 Ohio St. 2d 73.

The peculiar issue presented in the appeal in Palmore's case, however, is one not previously considered by this Court. To us there appears the distinct possibility that if the foregoing Rule 11(C)(3) is construed to bear the weight the trial court placed on it, the distinct specter of arbitrary and even freakish application of capital punishment then arises to haunt the Ohio procedure. We are confirmed in our concern with this aspect of Palmore's case as a result of the care taken by the Ohio Supreme Court in *State v. Bayless, supra*, at p. 84, to restate the principle enunciated by the United States Supreme Court in *Gregg v. Georgia* (1976), 49 L. Ed. 2d 859, 887, that:

> " 'In summary, the concerns expressed in *Furman* that the penalty of death not be imposed in an arbitrary or capricious manner can be met by a carefully drafted statute that ensures that the sentencing authority is give adequate information and guidance. As a general proposition these concerns are best met by a system that provides for a bifurcated proceeding at which the sentencing authority is apprised of the information relevant to the imposition of sentence and provided with standards to guide its use of the information.'. "

Here, the State of Ohio had from the outset objected to the dismissal of the specification; no negotiated plea bargain accompanied the dismissal. Rather, it is manifest that the trial judge unilaterally decided the question of whether to allow Palmore to live or die, predicating his authority to do so on Rule 11(C)(3), that is, upon his decision, arrived at in the manner discussed below, that to dismiss the specification would serve the "interests of justice."

Thus, before addressing himself to the specifics of his reasons, the trial court stated:

> " If I believe that on the basis of everything that I have learned in the courtroom, or through the Prosecutor or Defense, if I believed that this defendant, Palmore, was the man who shot Pomerantz, I would not accept his plea. The policy of the State is on record, and I would not think it appropriate. "

The court then continued with the reasons why he had concluded, in advance of trial, that Palmore was not the man who shot Pomernatz:

> " However, to confirm or to elaborate and deepen my understanding of what the State's case was here, over the weekend I took the liberty of talking to Officer Sefton, of the Homicide Squad, who along with his partner, Officer Thompson, was in charge of the investigation and development of this case, and examined this defendant and the co-defendant, and Mascus, the other man who was picked up in Covington, along with them. It was Officer Sefton's judgment, in which he said his partner concurred, that they do not think, of course, no one was there, and there can be no certainty in this matter, but in their opinion, this defendant was not the man who shot Pomerantz. "

The justifications for the dismissal, summarized, are: (1) Palmore did not kill Charles Pomerantz; (2) Palmore exhibited a willingness to testify against others if the State desired to call him; (3) that a guilty plea would avoid a lengthy trial and subsequent appeals of uncertain result and afford a certain con-

clusion, and (4) that the constitutionality of the Ohio capital punishment statute was in question.

While we deem it unnecessary to comment upon the above reasons advanced by the court for its decision, we note again that none of these conclusions were reached by a process in which the prosecutor participated, consented, or to which he agreed, an observation prompted by our recognition that plea bargaining, while not without its shortcomings and dangers, is a recognized device serving a respectable and necessary purpose, and one which has been held to be outside the orbit of arbitrariness and capriciousness struck down by *Furman*. See, *Gregg v. Georgia*, 49 L. Ed. 2d 859, 889 (1976), (opinion by Stewart, J., Powell and Stevens, J.J., concurring); Id at 903 (opinion by White, J., the Chief Justice, and Rehnquist, J., concurring). Certainly, one of the eventualities contemplated by Rule 11(C)(3) was the dismissal by the court of a specification, and the subsequent imposition of sentence, where such procedure has been suggested to the court as the result of the striking of a plea bargain between the State and the defendant. Another eventuality contemplated by Rule 11(C)(3) might well be the dismissal of a specification which, for one reason or another, is deficient <u>as a matter of law.</u> In both instances (which we do not necessarily insist are exclusive), the dismissal of the specification serves the "interests of justice" without at the same time providing an opportunity for the exercise of the kind of discretion which may work an arbitrary or capricious result in the treatment accorded different defendants in an otherwise similar posture.

Without laboring the matter further, we conclude that Crim. R. (11)(C)(3) must be construed to preclude the kind of action taken by the trial court in the Palmore case, and its use limited to those instances, as above, where the action in dismissing the specification is subject to ascertainable, predictable, and definable parameters which avoid by such definition the possibility of the results found, for instance, in comparing the disposition of Palmore with the disposition of Jackson. Only in such construction is it possible to avoid, in our judgment, the constitutional deficiencies held fatal in *Furman v. Georgia, supra.*

The several assignments of error asserted by the State have raised, directly in the second assignment and obliquely in the others, the issue to which we have addressed ourselves immediately above. We believe that, so considered, they are well taken and hold that the judgment in case number C-75231 (Palmore) must be reversed, set aside, and held for naught, and the cause is ordered remanded to the Court of Common Pleas of Hamilton County for further proceedings according to law and not inconsistent with this decision.

With respect to the appeal perfected by Jackson our conclusion is otherwise.

In his initial assignment, Jackson contends that the court erred in failing to suppress statements obtained from him by police officers. Our examination of the transcript of the proceedings convinces us that before Jackson was questioned he was fully and effectively advised of his constitutional rights and, indeed, ultimately signed a written waiver of those rights.

Apparently recognizing the impediment such evidence places in their path, counsel for Jackson submit in argument that the issue is not whether the interrogators failed to give the "Miranda" warning but whether Jackson's rights were, in fact, ignored. A comparison of all the evidence germane to the question of the admissibility of Jackson's inculpatory statement leads us to conclude that it was voluntarily given and that his protests that he was the victim of improper influence sufficient to overcome his will to resist interrogation are not supported in the record. The first assignment of error then is not well taken.

Jackson's second assignment of error raises the question whether Sections 2929.02-03-04, Revised Code, are constitutional. The Ohio Supreme Court, as already noted, addressed itself to that same issue in deciding *State v. Bayless, supra,* and declared in its initial syllabus that:

> " Ohio's statutory framework for the imposition of capital punishment, as adopted effective January 2, 1974, is constitutional and does not impose cruel and unusual punishment within the meaning of the Eighth Amendment to the United States Constitution. "

Resultantly, we find the second assignment not to be well taken on authority of *State v. Bayless, supra.*

As a corollary to his second assignment of error, Jackson advances, as a constitutional impediment to the judgment rendered against him, the disparity in the treatment of the two men, himself and Palmore, otherwise legally and inseparably yoked in the commission of the robbery and murder. Two comments need to be made about this argument. First, in view of the action of this Court today in the Palmore appeal, such disparity of treatment -- the

constitutional effect of which we have hereinbefore examined -- disappears, at least at the level brought to us in the Palmore appeal. As a result of further proceedings in the Palmore case, as directed herein, there may or may not be a disparity in the result finally obtained in the Palmore trial from that affirmed in the Jackson trial.

If there is a disparity in such final results, then a second comment becomes appropriate in answer to appellant Jackson's argument. Assuming, as we must, that subsequent proceedings in Palmore's case will be conducted pursuant to law and in accordance with the Ohio statutes now determined to be constitutional enactments, the fact that a different result may then be reached in the judgment accorded Palmore will not, in and of itself, cast a cloud on the judgment theretofore rendered against Jackson. There is no constitutional requirement that separate judgments against co-conspirators, where otherwise regular, must be equal and exact. *State v. Durham*, No. C-74595 (1st Dist. September 29, 1975, unreported).

It may well be determined, at the proper time and under the appropriate circumstances, that factual and/or legal reasons exist for reaching a result different in the one case than the other; it is the merest speculation to attempt to predict at this time whether such reasons may be sufficient in law. It is enough for now that this possibility does not raise a constitutional issue which Jackson can properly raise.

Having found no merit in the assignments of error in Case No. C-75519 (Jackson), nor any other error apparent from the record,

the judgment of the Court of Common Pleas of Hamilton County therein must be and is affirmed.

SHANNON, P. J., PALMER and KEEFE, J. J.

1. Rule 11(C)(4) is now numbered Rule 11(C)(3) and is so referred to in the body of this decision.

PLEASE NOTE:

The Court has placed of record its own entry in these cases on the date of the release of this Decision.

THE STATE OF OHIO,
City of Columbus.

19.....77..... TERM

The State of Ohio,
Appellee,

To wit: July 12, 1977

No. 77-147

vs.

Jerry Jackson,
Appellant.

ENTRY

(HAMILTON COUNTY)

Upon consideration of the motion, filed by counsel for appellant, to stay execution of sentence pending the timely filing of a notice of appeal or a petition for a writ of certiorari to the Supreme Court of the United States, it is therefore

ORDERED that execution of sentence be, and the same hereby is, stayed pending the timely filing of a notice of appeal or a petition for a writ of certiorari to the Supreme Court of the United States.

It is further ORDERED that if a timely notice of appeal or a petition for a writ of certiorari is filed to the Supreme Court of the United States, this stay will automatically continue pending final determination of the case by that Court.

It is further ORDERED that the Clerk of this Court shall forthwith send a certified copy of this Stay of Execution to the Superintendent of the Southern Ohio Correctional Facility, who shall acknowledge receipt thereof.

CHIEF JUSTICE

I, THOMAS L. STARTZMAN, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing entry was correctly copied from the records of said Court, to wit, from Journal No.....Page.....

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of the Supreme Court this 12th *day of* July *19*77

THOMAS L. STARTZMAN *Clerk.*

By .....*Deputy.*

COURT OF COMMON PLEAS

HAMILTON COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff	:	No. B-743479
-vs-	:	
CURTIS PALMORE	:	MEMORANDUM OF DECISION
Defendant	:	

On December 13, 1976, the Court of Appeals reversed and remanded the judgment of this Court dismissing the specification of the indictment for aggravated murder against the defendant, Curtis Palmore, under authority of Crim. R. 11(C)(3) and the sentence of life imprisonment. Upon remand defendant filed a motion to dismiss the specification of aggravating circumstances in Count 1 of the indictment for the following reasons: (1) defendant has not been afforded a speedy trial under the terms of Sections 2945.71 through 2945.73 of the Revised Code; (2) defendant has been once in jeopardy as a result of the former judgment of conviction entered by this Court on April 21, 1975; (3) defendant has been once in jeopardy as a result of the sentence of life imprisonment imposed by this Court on April 21, 1975; (4) by virtue of Sections 2945.68 through 2945.70 of the Revised Code the Court of Appeals lacked jurisdiction to vacate this Court's judgment when the State rather than the defendant appealed; (5) absent the trial judge's abuse of discretion the Court of Appeals lacked jurisdiction to vacate his judgment.

The defendant, Curtis Palmore, and Jerry Jackson were jointly indicted for aggravated murder and aggravated robbery arising out of the death of Charles Pomerantz, a 17 year old service station attendant. Defendant's separate trial was set for April 21, 1975, but prior to impanelling a jury on that date and despite the objection of the Prosecuting Attorney, the trial judge accepted defendant's plea of guilty to both counts of the indictment, dismissed the specification of aggravating circumstances in Count 1 "in the interest of justice" pursuant to Crim. R. 11(C)(3), and sentenced Palmore to life imprisonment on Count 1, aggravated murder, and to a term of 7 to 25 years on Count II, aggravated robbery, the terms to run concurrently.

Subsequently, the co-defendant, Jackson, waived a jury and went to trial before a three judge panel. On 4 different occasions before and during this trial Jackson attempted to plead guilty to both counts of the indictment in exchange for the Court's dismissal of the specification under Crim. R. 11(C)(3) as in Palmore's case. The three judge panel rejected Jackson's attempted plea ultimately finding him guilty of aggravated murder with the specification of aggravating circumstances and of aggravated robbery. On September 11, 1975, the three judges sentenced Jackson to death.

The Court of Appeals considered the State's appeal in Palmore together with the defendant's appeal in Jackson issuing one written Decision for both appeals reversing Palmore and affirming Jackson. The Supreme Court dismissed Palmore's direct appeal and motion for leave to appeal from the order reversing

the trial court for the lack of a substantial constitutional question, but accepted Jackson's direct appeal as a matter of right under Section 2 (B) 2 (a) (ii) of Article IV of the Ohio Constitution and affirmed the Court of Appeals on June 22, 1977, State v. Jackson, 50 Ohio St.2d 253 (1977).

In the Palmore Case the Court of Appeals gave only one reason for reversing this Court's judgment - absent a plea bargain the trial judge's discretionary acceptance of a guilty plea to aggravated murder and his dismissal of a specification involves a discriminatory application of the death penalty even though this procedure is authorized under Crim. R. 11(C)(3) which states:

> With respect to aggravated murder committed on and after January 1, 1974, the defendant shall plead separately to the charge and to each specification, if any. A plea of guilty or no contest to the charge waives the defendant's right to a jury trial, and before accepting such plea the court shall so advise the defendant and determine that he understands the consequences of such plea.
>
> If the indictment contains no specification, and a plea of guilty or no contest to the charge is accepted, the court shall impose the sentence provided by law.
>
> If the indictment contains one or more specifications, and a plea of guilty or no contest to the charge is accepted, the court may dismiss the specifications and impose sentence accordingly, in the interests of justice. (Emphasis added).

Although the judgment entry reflects that the trial judge meticulously followed Crim. R. 11(C)(3), the Court of Appeals specifically held:

> This Court has decided . . . that: (a) the Ohio statutes imposing the death penalty do not permit arbitrary discriminatory, and freakish application thereof and thus meet constitutional muster under Furman v. Georgia 408 U.S. 238 (1972) . . . (p.9, C75231).
>
> Here, the State of Ohio had from the outset objected to the dismissal of the specification; no negotiated plea bargain accompanied the dismissal. Rather, it is manifest that the trial judge unilaterally decided the question of whether to allow Palmore to live or die, predicating his authority to do so on Rule 11 (C)(3), that is, upon his decision, arrived at in the manner discussed below that to dismiss the specification would serve the "interests of justice." (p.10, C75231). (Emphasis added)

Their decision, therefore, stands for the proposition, that in spite of the trial Court's power to decide minimum and maximum sentences, the Prosecuting Attorney has a veto over the discretion of the Court to reduce a sentence of death to life imprisonment as provided in Crim. R. 11(C)(3).

The Supreme Court of Ohio, however, held to the contrary in the recent and subsequent case of State v. Weind, 50 Ohio St.2d 224, 227-28 (1977):

> . . . appellant argues that Crim. R. 11(C)(3) is unconstitutional in that it gives the trial judge unbridled discretion in imposing the death sentence . . .
>
> Thus, while a defendant who pleads guilty or no contest to an indictment containing one or more specifications may obtain dismissal of such specification and thus avoid the death sentence if the trial judge finds the dismissal to be in the interests of justice, a defendant who pleads not guilty must rely on the court finding the presence of one of the mitigating circumstances, enumerated in R. C. 2729.04(B), to avoid the death sentence . . .

> The Supreme Court held that the existence of these discretionary stages in the sentencing procedure did not violate the holding in Furman v. Georgia (1972), 408 U.S. 238, since that case dealt with the imposition of the death sentence on an individual convicted of a capital offense, and not with acts of mercy that remove those defendants from consideration as candidates for the death penalty . . . (Emphasis added).

In the appeal of Palmore's co-defendant, Jackson, the Supreme Court if not specifically, at least, inferrentially recognizes the validity of Crim. R. 11(C)(3) by quoting it with approval in footnote 6 and stating, State v. Jackson, supra., 259:

> "Furman mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." Gregg v. Georgia (1976), 428 U.S. 153, 189. Denial of a plea-bargain to defendant indicted for a capital offense is not at all arbitrary and capricious; it is consistent with statutes and rules of court directing the prosecution and punishment of criminals.[6]

Since both State v. Weind, supra., and State v. Jackson, supra., are per curiam opinions, the foregoing quotations are the law of the case, Masheter v. Kehe, 49 Ohio St.2d 148, 150 (1976). Accordingly, we conclude that these decisions supersede the decision of the Court of Appeals on this issue, and thus, even though published in a different case, they are controlling. State ex rel Searl v. Small, 103 Ohio App. 214, 216 (1956). Therefore, we find that Crim. R. 11(C)(3) and the trial judge's judgment entry are not unconstitutionally discriminatory, and defendant's motion to dismiss is well taken and granted as it relates to the fifth issue which pertains to a failure to show the trial judge abused his discretion.

Because of the probability of review, we conclude that we should also comment upon the other four issues presented by defendant's motion to dismiss. Defendant's complaint that he will not be afforded a speedy trial pursuant to Sections 2945.71 through 2945.73, requiring trial within 90 days from his arrest by virtue of his incarceration, is without merit. This statute, implementing the Sixth Amendment, obviously relates to the initial trial and not to delays caused by appeal or trial upon a remand. Furthermore, the record affirmatively illustrates that any delays have been appropriately documented and time enlarged.

Issues number 2 and 3 relative to former jeopardy are presented in tandem and involve two distinct arguments. First, defendant maintains that the Court's dismissal of the specifications is equivalent to a finding of guilty by a jury on a lesser charge amounting to former jeopardy as defined in Mullreed v. Kropp, 425 F.2d 1095 (6th Cir. 1970). What is significant in Mullreed, id., however, is not mere conviction for a lesser offense. Instead, the crucial question in determining former jeopardy is whether the prosecution relinquishes its right to prosecute on a greater offense, Green v. United States, 355 U.S. 184 (1957); United States v. Anderson, 514 F.2d 583 (7th Cir. 1975). Clearly, jeopardy does not attach if the plea is received when the State does not consent or rejects defendant's plea bargain, and thus has not relinquished prosecutorial rights.

The second part of defendant's jeopardy contention is founded upon State ex rel Johnson, Attorney General v. Thompson, District Judge, 76 N.D. 125, 34 N.W.2d 80 (1948), holding that a

reduced sentence in a capital case places the defendant in jeopardy when a judge other than the assigned judge imposes sentence with consent of the local prosecutor but over objection of the appropriate prosecuting authority. The Court held that this judgment was only voidable, and therefore, unlike a void judgment jeopardy attaches. Although Ohio courts recognize the distinction between a void indictment and immaterial defects, State v. McGraw, 86 Ohio L.Abs 490, 19 Ohio Ops.2d 174, 178 (C.P. 1961), it is well established that there is no jeopardy if the judgment is void, and the defendant sets in motion the proceedings which nullified the judgment, Foran v. Maxwell, 173 Ohio St. 561, 562 (1962). Based upon the decision of the Court of Appeals which states, ". . . the judgment in case number C-75231 (Palmore) must be reversed, set aside, and held for naught . . ." we can only conclude that the Court of Appeals determined that this Court's judgment was void, on the law as it existed prior to State v. Weind, supra., and State V. Jackson, supra. In light of these decisions jeopardy must attach.

Defendant's fourth issue raises the question whether the State can try defendant on the specification when the reversal of this Court's action is obtained by the State rather than by the defendant. The State's right to appeal in criminal cases is expressly limited in Sections 2945.67 through 2945.70 of the Revised Code authorizing an Appellate Court to reverse on a motion to quash, a plea in abatement, a demurrer, a motion to suppress evidence and a motion in arrest of judgment. Any attempt to enlarge the State's right to appeal is an unconstitutional exercise of power, Euclid v. Heaton, 15 Ohio St.2d 65 (1968). State v. Collins, 24 Ohio St.2d

107 (1970). These cases established, that outside the limited statutory areas authorizing the State to appeal, any appellate review is restricted to an advisory opinion only. Yet, no matter how persuasive defendant's argument and his authorities presented, the mandate of the Court of Appeals is to the contrary. It is not appropriate for this Court to ignore the implicit finding of its own jurisdiction by the Court of Appeals.

For the foregoing reasons, and because of the Supreme Court's later decisions in State v. Weind, supra., and State v. Jackson, supra., this Court finds that the action of the trial judge and his judgment of April 21, 1975 are not unconstitutionally discriminatory and are appropriate. Therefore, the motion of defendant to dismiss is overruled with regard to issues 1, 2, and 3, and is granted with regard to issue 4 and 5.

Harry T. Klusmeier,
Presiding Judge

Rupert A. Doan

Robert H. Gorman

William P. Whalen, Jr., Esq.
Assistant Prosecuting Attorney

Robert H. Davis, Esq.
Attorney for Defendant

Leslie I. Gaines, Jr., Esq.
Attorney for Defendant

BARRETT BROTHERS, PUBLISHERS, SPRINGFIELD, OHIO

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO,
City of Columbus.

19.77... TERM

To wit: June 23, 1977

The State of Ohio,
Appellee,

No. 77-147

vs.

APPEAL FROM THE COURT OF APPEALS

Jerry Jackson,
Appellant.

for HAMILTON *County*

This cause, here on appeal from the Court of Appeals for HAMILTON *County, was heard in the manner prescribed by law. On consideration thereof, the judgment of the Court of Appeals is affirmed* for the reasons set forth in the opinion rendered herein and it appearing to the Court that the date heretofore fixed for the execution of the judgment and sentence of the Court of Common Pleas is now past, this Court proceeding as required by law does hereby fix the 22nd day of August, 1977, as the date for carrying said sentence into execution by the Superintendent of the Southern Ohio Correctional Facility, or in his absence by the Assistant Superintendent, in accordance with the statutes in such case made and provided.

It is further ordered that a certified copy of this entry and a warrant under the seal of this Court be duly certified to the Superintendent of the Southern Ohio Correctional Facility and the Superintendent make due return thereof to the Clerk of the Court of Common Pleas of Hamilton County,

and it appearing that there were reasonable grounds for this appeal, it is ordered that no penalty be assessed herein.

It is further ordered that the ...*appellee*... *recover from the* ...*appellant*... its ... *costs herein expended; that a mandate be sent to the* COMMON PLEAS COURT ... *to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for* HAMILTON *County for entry.*

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this ... day of ... 19...

FOR YOUR INFORMATION ONLY NOT FOR FILING

Clerk

Deputy

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO,
City of Columbus.

19.....77..... TERM

To wit: June 22, 1977

The State of Ohio,
Appellee,

vs.

Jerry Jackson,
Appellant.

No. 77-147

MANDATE

To the Honorable COMMON PLEAS COURT

Within and for the County of HAMILTON, *Ohio, Greeting:*

The Supreme Court of Ohio commands you to proceed without delay to carry the following judgment in this cause into execution:

Judgment of the Court of Appeals affirmed for the reasons set forth in the opinion rendered herein.

It is further ordered that execution date be set for Monday, August 22, 1977.

THOMAS L. STARTZMAN,
Clerk

.....*19*.....

.....

.....*Deputy*

RECORD OF COSTS

Docket Fee . . . . . $.....*Paid by* Affidavit of Poverty

Docket Fee . . . . . $.....*Paid by*.....

Docket Fee . . . . . $.....*Paid by*.....

Printing Record . . . . . $.....*Paid by*.....

Supplemental Record . . $.....*Paid by*.....

Sheriff's Costs . . . . . $.....*Paid by*.....

Sheriff's Costs . . . . . $.....*Paid by*.....

834

COURT OF APPEALS

FIRST APPELLATE DISTRICT

HAMILTON COUNTY, OHIO

B 743479

12-13-76

STATE OF OHIO, NO. C-75519

Appellee, D JUDGMENT ENTRY.

vs.

JERRY JACKSON,

ENTERED
DEC 13 1976
IMAGE 70

To the Clerk:
Enter upon the journal of the court.

Presiding Judge

Appellant.

This cause came on to be heard upon the appeal on questions of law, assignments of error, the record from the Court of Common Pleas of Hamilton County, Ohio, the briefs and the arguments of counsel.

Upon consideration thereof, the Court finds that the assignments of error are not well taken for the reasons set forth in the Decision filed herein and made a part hereof.

It is, therefore, Ordered by the Court that the judgment of the Court of Common Pleas of Hamilton County, Ohio, be, and the same hereby is, affirmed.

It is further Ordered that a mandate be sent to the Court of Common Pleas of Hamilton County, Ohio, for execution upon this judgment.

Costs to be taxed in compliance with Rule 24, Appellate Rules.

And the Court being of the opinion that there were reasonable grounds for this appeal, allows no penalty.

It is further Ordered that a certified copy of this Judgment, with a copy of the Decision attached, shall constitute the mandate pursuant to Rule 27, Ohio Rules of Appellate Procedure.

To all of which the appellant, by his counsel, excepts.

Enter. Morrissey J.

THE STATE OF OHIO, HAMILTON COUNTY

COURT OF COMMON PLEAS

STATE OF OHIO, Plaintiff	:	NO. B743479
vs.	:	SENTENCE
JERRY JACKSON, Defendant	:	

The Court on a prior day having found the Defendant guilty of Aggravated Murder as charged in the First Count of the indictment and that such Murder was committed while the Defendant was committing Aggravated Robbery; and further found the Defendant guilty of Aggravated Robbery as charged in the Second Count of the indictment, and having further found that none of the mitigating circumstances listed in O. R. C. 2929.04(B) is established by a preponderance of the evidence;

And the Defendant having been brought before the Court accompanied by his counsel and inquiry being made as to whether there was any reason judgment should not be pronounced and no reason being advanced;

NOW THEREFORE IT IS ORDERED, ADJUDGED AND DECREED that the Defendant, Jerry Jackson, on the charge of Aggravated Robbery, be confined in the Ohio State Reformatory for a period of not less than seven (7) years nor more than twenty-five (25) years; such sentence to be served consecutively; and on the charge of Aggravated Murder the Defendant is remanded to the custody of the Sheriff of Hamilton County, Ohio, and within the next thirty (30) days shall be delivered by the Sheriff to the Warden of the Ohio State Penitentiary, and said Warden shall retain custody of the said Defendant until January 14, 1976, at which time the death sentence will be carried out in accordance with law.

William Morrissey

David W. Castle

Thomas Nurre

Judges, Court of Common Pleas

Vote: Morrissey J.

THE STATE OF OHIO, HAMILTON COUNTY

COURT OF COMMON PLEAS

CRIMINAL DIVISION

THE STATE OF OHIO

-vs-

Jerry Jackson

NO. B743479

INDICTMENT FOR: AGGRAVATED MURDER 2903.01 R.C. & AGGRAVATED ROBBERY 2911.01 R.C.

C O U R T F I N D I N G

This Cause came on to be heard, the Defendant, Jerry Jackson having waived a trial by Jury, in writing, and was submitted to the panel of three (3) Judges, Hon. William J.Morrissey, Hon. Lyle W. Castle and Hon. Thomas C. Nurre.

This Court finds unanimously, the Defendant, Jerry Jackson, guilty of Aggravated Murder as charged in the First Count of the Indictment; Guilty of Aggravated Robbery as charged in the Second Count of the Indictment. This Court also finds unanimously the Defendant, Jerry Jackson, Guilty to the Specification to the First Count, in which it is specified that the Aggravated Murder was committed while the Defendant was committing Aggravated Robbery in violation of Section 2911.01 R.C. of Ohio.

A pre-sentence investigation is Ordered immediately and a psychiatric examination will be made of the Defendant.

JUDGE WILLIAM J. MORRISSEY

JUDGE LYLE W. CASTLE

JUDGE THOMAS C. NURRE

(20)

THE STATE OF OHIO, HAMILTON COUNTY

The Court of Common Pleas of Hamilton County:

Term of OCTOBER *in the year nineteen hundred and* SEVENTY-FOUR

HAMILTON COUNTY, ss.

FIRST COUNT

The Grand Jurors of the County of Hamilton, in the name and by authority of the State of Ohio, upon their oaths present that CURTIS PALMORE AND JERRY JACKSON

on or about the FOURTEENTH *day of* NOVEMBER *in the year nineteen hundred and* SEVENTY-FOUR *at the County of Hamilton and State of Ohio, aforesaid,* PURPOSELY CAUSED THE DEATH OF CHARLES POMERANTZ, WHILE THE SAID CURTIS PALMORE AND JERRY JACKSON WERE COMMITTING AGGRAVATED ROBBERY, IN VIOLATION OF SECTION 2903.01 OF THE OHIO REVISED CODE.

SECOND COUNT

AND THE GRAND JURORS AFORESAID UPON THEIR OATHS AFORESAID DO FURTHER PRESENT THAT CURTIS PALMORE AND JERRY JACKSON ON OR ABOUT THE FOURTEENTH DAY OF NOVEMBER IN THE YEAR NINETEEN HUNDRED AND SEVENTY-FOUR AT THE COUNTY OF HAMILTON AND STATE OF OHIO, AFORESAID, IN COMMITTING A THEFT OFFENSE, INFLICTED SERIOUS PHYSICAL HARM ON CHARLES POMERANTZ, IN VIOLATION OF SECTION 2911.01 OF THE OHIO REVISED CODE.

SPECIFICATION TO THE FIRST COUNT

THE GRAND JURORS FURTHER FIND AND SPECIFY THAT THE OFFENSE IN THE FIRST COUNT OF THE INDICTMENT WAS COMMITTED WHILE THE SAID CURTIS PALMORE AND JERRY JACKSON WERE COMMITTING AGGRAVATED ROBBERY, IN VIOLATION OF SECTION 2911.01 OF THE OHIO REVISED CODE.

Simon L. Leis, Jr.

PROSECUTING ATTORNEY
HAMILTON COUNTY, OHIO

ASS'T. PROSECUTING ATTY.

IN THE SUPREME COURT OF OHIO

STATE OF OHIO	:	No. 77-147
Plaintiff-Appellee	:	
Vs.	:	
JERRY JACKSON	:	
Defendant-Appellant	:	

APPEAL FROM THE COURT OF APPEALS
FIRST APPELLATE DISTRICT
HAMILTON COUNTY, OHIO

CONSOLIDATED MOTIONS OF DEFENDANT-APPELLANT FOR REHEARING AND STAY OF EXECUTION

Albert J. Mestemaker
Latimer and Swing Co., L.P.A.
2312 Kroger Building
1014 Vine Street
Cincinnati, Ohio 45202
(513) 721-7500

and

Donald G. Montfort
Hamilton County Public Defender
402 Hamilton County Courthouse
Cincinnati, Ohio 45202

Counsel for Defendant-Appellant

IN THE SUPREME COURT OF OHIO

STATE OF OHIO	:	No. 77-147
Plaintiff-Appellee	:	
Vs.	:	
JERRY JACKSON	:	
Defendant-Appellant	:	

:::

MOTIONS

Defendant-Appellant, Jerry Jackson, by and through his attorney, moves the Court for the following orders:

1. The granting of a rehearing and supplemental oral arguments pursuant to Rule IX, Section 1, of the Rules of Practice of this Court; and

2. An order staying the execution of the death sentence previously inposed by this court on June 22, 1977, which is to be carried out on ugust 22, 1977 pursuant to Rule IX, Section 2, of the Rules of Practice of this Court and Section 2949.24 of the Ohio Revised Code, pending this court's determination of this motion for rehearing and/or pending the filing and disposition of a petition for certiorori in the United States Supreme Court.

WHEREFORE, defendant-appellant, Jerry Jackson, prays this court to stay the execution of sentence pending this court's and/or The United States Supreme Court's ruling on this appeal and to grant the Motion for rehearing and re-argument.

MEMORANDUM IN SUPPORT OF MOTIONS

On June 22, 1977, this court affirmed the conviction and judgment of defendant-appellant, Jerry Jackson, *State v. Jackson*, 50 Ohio St. 2d 253 (1977).

Defendant-Appellant respectfully submits that Rule 11 (c)(3), Ohio Rules of Criminal Procedure, injects an unconstitutional element into the Ohio statutory scheme which permits for the imposition of the death penalty by allowing the trial judge to arbitrarily and capriciously set aside a specification at the trial court's whim of what constitutes "in the interest of justice". Such a system is inconsistent with *Furman v. Georgia*, 428 U.S. 153 (1976) and *Gregg v. Georgia*, 428 U.S. 153 (1976) and therefore, unconstitutional.

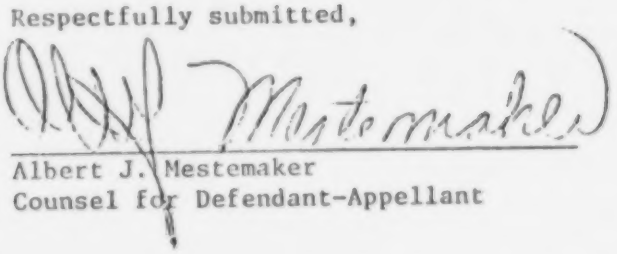
Defendant-appellant is aware that the United States Supreme Court and this Court have recognized the part plea-bargaining plays in the criminal justice system. In the present case co-defendant, Curtis Palmore's specification was set aside not as the result of a plea bargain but rather at the whim of the trial judge. The mere fact such a result could occur is prima facie evidence that the death penalty in Ohio can be avoided by the roll of the dice at the time a case is assigned to a trial judge. Such a system is unconstitutional.

Furthermore, defendant-appellant assents that this court has not afforded him adequate appellate review. The decision of this court merely reflects that the court has reviewed the record and found that the record supports the conviction and sentence. In *Profitt v. Florida*, 428 U.S._____, 49 L. Ed. 2d 913 (1976), the United States Supreme Court sanctioned a case by case comparison as a requirement for execution. There is no indication that this court reviewed comparable cases to determine whether defendant-appellant's sentence was disproportionate to other defendants who faced the death penalty.

For the reasons stated above, the defendant-appellant requests orders

from this court granting the motions filed herein.

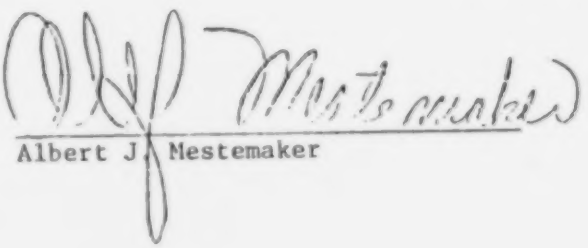
Respectfully submitted,



Albert J. Mestemaker
Counsel for Defendant-Appellant

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served on Leonard Kirschner, Assistant Prosecuting Attorney, 420 Hamilton County Court House, Cincinnati, Ohio 45202, by posting same in the U.S. Mail on the 2nd day of June, 1977.



Albert J. Mestemaker